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THE  
CANADIAN  
LAW TIMES

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VOL. VII.

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TORONTO:  
CARSWELL & CO., PUBLISHERS.  
1887.

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TORONTO.



# THE CANADIAN LAW TIMES.

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VOL. VII.

JANUARY, 1887.

No. 1.

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## NOTES ON THE DEVOLUTION OF ESTATES ACT, 1886.

THIS Act gives evidence in some parts of a bold venture in the direction of making real estate personalty in the hands of the personal representative, while in other parts there is just as cogent evidence of a restraining influence upon so radical a change and hesitation to take the step. It is strikingly in contrast with the Act of the Parliament of Canada relative to real property in the North-West Territories, which enacts that "All lands in the Territories which, by the Common Law are regarded as real estate, shall be held to be chattels real, and shall go to the executor or administrator of any person or persons dying seised or possessed thereof, as other personal estate now passes to the personal representative" (a). Under this section there is no mistaking the nature of land in the hands of an executor or administrator. If such a radical change as this had been intended by the Legislature of Ontario, it is fair to presume that the most explicit and unequivocal language would have been used, and it may safely be said that such language should be required of the Legislature. But the Act appears to keep up and distinctly recognize the difference between real and personal property. A widow may elect to take her dower, a widower his estate

(a) 49 Vict. cap. 26, sec. 5.

by the curtesy—and both of these provisions tend to preserve the character of realty to land and to prevent the absolute disposition of and incidental dealings with it which are the peculiar characteristics of personalty. And there is nothing in the Act to indicate that a writ of execution against goods would bind the land of a *defunctus* in the hands of the personal representative.

Before attempting to construe the Act it will be convenient to glance at the relations which the personal representative bore to the real property of a deceased person before the Act, bearing in mind Lord Coke's resolutions to inquire 1. What was the law before the Act was passed. 2. What was the mischief or defect for which the law had not provided. 3. What remedy parliament has appointed. 4. The reason for the remedy (*b*).

In the early history of the North American Colonies, lands were considered to be chattels in the hands of a debtor for the payment of debts (*c*); and various acts or ordinances were passed by the various Plantations to make land exigible at the instance of creditors, but the law of tenures and estates apparently remained unchanged. For the Plantations generally the Imperial Parliament, either ignoring these local laws altogether or doubting their validity, passed an Act in the fifth year of the reign of George the Second (*d*), reciting that his Majesty's subjects trading to the British Plantations in America lay under great difficulties for want of more easy methods of proving, recovering, and levying of debts due to them than were then used in some of the plantations, and that it would tend very much to retrieve the credit formerly given by the trading subjects of Great Britain to the natives and inhabitants of the plantations if such inconveniences were remedied. And it was enacted that the houses, lands, negroes, and other hereditaments and real estate, should be liable to and chargeable with all just debts, and should be assets for the satisfaction thereof, and should be subject to the

(*b*) *Heydon's Case*, 3 Rep. 7b; 10 Rep. 7a.

(*c*) *Gardiner v. Gardiner*, 2 O. S. at p. 570.

(*d*) 15 Geo. II. cap. 7.

like remedies, proceedings, and process in any Court of law or equity, for seizing, selling, &c., such lands, &c., in like manner as personal estates in any of the plantations were seized, sold, &c., for the satisfaction of debts.

This Act is the foundation of the right to execution against lands in this Province. It gave rise to the celebrated case of *Gardiner v. Gardiner* (e), in which it was determined that though the lands of a debtor were cast upon his heirs at his death, still as they were assets for the payment of his debts and subject to the like process as personalty, judgment might be obtained against the personal representative and execution thereon issued against the lands.

This decision being doubted, in 1863 an Act was passed (f) which recited the state of the law as declared by *Gardiner v. Gardiner*, that titles had been acquired under such proceedings, and that it was desired to quiet the same; and the law was declared to be as decided. This provision is embodied in the Execution Act (g).

Notwithstanding this enactment the land descended to the heir at law, or passed to the devisee by will, and either one could make a good title to a *bona fide* purchaser for value (h) before judgment and execution against the executor or administrator.

The personal representative, therefore, although liable to be sued if the deceased died entitled to land, was compelled to remain passive as far as the land was concerned until the creditor brought his action, and then upon the proper pleading the creditor got judgment for his debt and execution against the lands.

A creditor had also the remedy in a proper case to have realty administered by summary proceeding upon notice given to the heir or devisee.

(e) 2 O. S. 554.

(f) 27 Vict. cap. 15.

(g) R. S. O. cap. 66, sec. 40. See also R. S. O., cap. 107, sec. 13.

(h) *Reid v. Miller*, 24 U. C. R. 610.

The power of an executor when there was a general charge of debts upon the testator's estate was a power arising upon the construction of wills, and reference may be made to a recent case in which the question was very fully discussed (i).

In addition to the right in Equity of executors to deal with the real estate of their testator there are the statutory powers given to them and to administrators with the will annexed by the Trustees and Executors Act (j), the provisions of which are well known.

In the case of a bare trustee dying seised in fee simple of a hereditament, it vests in his legal personal representative from time to time (k). And when the owner of land dies under a liability to convey in pursuance of a written contract, and no provision is made by will, his personal representative is the proper person to convey (l).

It will be noticed that in the case of a bare trustee there is no beneficial interest whatever to be disposed of or enjoyed; the mere formality of making a conveyance is all that remains to be done. In the case of a person dying under liability to convey in pursuance of a written contract, the personal representative is entitled to the purchase money, and there is a peculiar fitness therefore in casting the estate upon him for the purpose of conveyance. The heir is deprived of nothing, as he was entitled to nothing.

With respect to estates *pur autre vie*, it was enacted by the Statute of Frauds that where there was no special occupant named the land should be assets in the hands of the executors; and doubts having arisen upon the construction of this clause, it was repealed and re-enacted with amendments by the Act 14 Geo. 2, cap. 20, sec. 9, which directed the distribution of the proceeds of the surplus after paying debts amongst those entitled to the personal estate. It is to be observed here also that the executor or administrator

(i) *Yost v. Adams*, 8 Ont. 611; 13 App. R. 129.

(j) R. S. O. cap. 107, secs. 17-24.

(k) R. S. O. cap. 107, sec. 5.

(l) R. S. O. cap. 107, sec. 75.

took only when there was no special occupant. We shall have occasion to refer to this legislation again.

Finally, by section nineteen of the Married Women's Act, 1884, it is enacted that "For the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living." Her rights and liabilities when living are to acquire, hold, and dispose by will or otherwise of her real property as if she were a feme sole; and to be sued and sue on her contracts made with respect to her separate estate as if she were a feme sole. There is, we believe, no decision upon the effect of this section; but if there is any meaning in it the personal representative takes the realty to the exclusion of the husband, and to the extent of its value answers the liabilities of the deceased and holds the surplus for distribution. The only way to avoid this result is to construe "separate estate" as separate personal property," a construction that would seem to do violence to the next section which speaks of "separate personal property."

The sum of the foregoing enactments is that, from the creditor's point of view the land of a deceased person was assets for the satisfaction of debts just as personalty was, but the creditor was liable to be defeated by alienation by the heir or devisee before judgment and execution. This, in the absence of a charge of debts. From the point of view of the personal representative the law was that unless he had specific power to sell either by devise or by statute, he had to remain passive until the creditor brought his action; but if the deceased was a bare trustee or was at the time of his death under a liability to convey in pursuance of a written contract for the sale of lands, the personal representative in each case had the liability and duty cast upon him to convey. And probably upon the death of a married woman her personal representative succeeds to her separate real property subject to her liabilities incurred with respect thereto. And if the estate were an estate for the life of another it went to the personal representative if

there were no special occupant. We have thus seen that executors and administrators have gradually been accorded no mean powers with respect to the realty of deceased persons, and at the same time they have from an early date been under a liability with respect to land from which there was no escape, and which at the same time they were powerless to discharge, however willing they might be, except where express testamentary or statutory powers were given them.

To remove the anomaly of the personal representative being liable to be sued when there were lands, and yet being powerless to dispose of them by his own act, and to save the creditors from defeat by alienation of the lands at the hand of the heir, or devisee, in other words, to provide a universal successor to the deceased who would represent all his property and all his liabilities until his affairs were settled, would be to remedy the defect or mischief existing before the Act. There was no reason for assimilating the devolution of real estate to that of personalty—no grievance existed before the Act in that respect—and mere symmetry or uniformity in the disposition of the estate should not be sought to the disherison of the heir unless the statute requires it.

It will be convenient at this point to glance at the English legislation respecting estates *pur autre vie*. By the Statute of Frauds, section 12, it was enacted that if no devise should be made of an estate *pur autre vie* the same should be chargeable in the hands of the heir, if it should come to him by special occupancy, as assets by descent; and in case there should be no special occupant it should go to the executors or administrators of the grantee and should be assets in their hands. Lord Eldon, in speaking of this Act (m) said that the land was personal estate to the extent at least of being assets, “yet I doubt,” said his Lordship, “whether an executor or administrator *ever takes anything as such that he would not be bound to apply as personal estate of the testator.*” And if this had been the first

(m) *Ripley v. Waterworth*, 7 Ves. at p. 438.

case, we may judge from these remarks that the executor or administrator would have been bound to distribute the surplus after payment of debts amongst the next of kin, simply because the title vested in the personal representative. Before this case, however, it had been determined that though the estate became assets in the hands of the executors, its nature had not been changed by the Act. Being a freehold estate, it remained so, not acquiring the characteristics of a chattel, and so not being distributable as personalty within the Statute of Distributions (n).

In consequence of this decision the Act of 14 Geo. 2 cap. 20, sec. 9 was passed which recited the Statute of Frauds, and that doubts had arisen where no devise was made of such estates, to whom the surplus of such estates, after the debts were paid should belong, and enacted "that such estates *pur autre vie*, in case there be no special occupant thereof, of which no devise shall have been made according to the said Act for the prevention of Frauds and Perjuries, or so much thereof as shall not have been so devised shall go, be applied and distributed, in the same manner as the personal estates of the testator or intestate." The first case that arose under this Act was *Ripley v. Waterworth* (o) already referred to. In that case lands had been limited to a man, his executors, administrators and assigns *pur autre vie*. He died having made his will and appointed an executor, and made a residuary bequest of his personal estate. The will was not attested as required by the Statute of Frauds so as to pass the estate in question. There were four claimants to the estate, the heir-at-law, the residuary legatee, the next of kin, and the executor for his own benefit. The heir-at-law argued that it was real estate, a descendible freehold, that it would not pass under the will, that an executor could not take as special occupant, and therefore that he, the heir-at-law, was entitled. The residuary legatee and next of kin argued, that the executor took as special occupant and that it became personalty in

(n) *Oldham v. Pickering*, 2 Salk. 461.

(o) 7 Ves. 425.



his hands and distributable as such. Lord Eldon decided that it did not go either to the heir or executor; and that as between the next of kin and the residuary legatee the executor was trustee, in equity, for those to whom the testator had given the personal estate by a will sufficient to pass personal estate, and therefore that the estate went to the residuary legatee (*p*).

The Act of George the Second applies only where the heir does not take as special occupant and there is no devise; and as the *Devolution of Estates Act* applies only to estates limited to the heir as special occupant, the law as interpreted by Lord Eldon in cases within the Act of George the Second will remain the same. It is worthy of remark that in such cases the heir not being entitled to take because not named in the grant is not deprived of any estate by the Act.

In comparing the English legislation with our present Act there are many things apparent in the latter to indicate that real property, while retaining its character of realty, is yet to be distributed amongst the next of kin and not amongst the heirs at law. For instance, the use of the word "distribution," a technical word, indicates an intention to treat lands as personalty (*q*). Again, land not disposed of is to be "distributed as personal property not so disposed of is *hereafter* to be distributed." Some slight change in the course of distribution is made by subsequent sections of the Act, and the inference to be drawn from this wording is that whereas personal property was formerly distributed according to a well ascertained course, hereafter it shall take a slightly different course, and the realty shall be distributed as personalty is hereafter to be distributed. The ninth section, too, declares that the personal representative shall have power to deal with realty "with all the like incidents, but subject to all the like rights, equities and obligations as if the same were personal

(*p*) See also *Fitzroy v. Howard*, 3 Russ. 230; *Watkins v. Lea*, 6 Ves. 642; *Duke of Devon v. Atkins*, 2 P. Wms. 381.

(*q*) See remarks by Lord Eldon in *Ripley v. Waterworth*, 7 Ves. at p. 440.

property vested in them.” And we may add Lord Eldon’s opinion, or doubt, than an executor or administrator taking as such must distribute what he takes as personalty.

Notwithstanding this it is evident that the law of tenures and estates has not been changed. The Act applies to estates of inheritance in fee simple, or limited to the heir as special occupant. And so we must still limit land to a man and his heirs, and an estate *pur autre vie* to the heir as special occupant in order to bring an estate within the Act. In the grantee’s lifetime an estate in fee simple is such an estate at common law. In the hands of his executors it retains its character of an estate in fee simple, and is to be conveyed as such and limited again to the heirs of a purchaser or of those entitled in the course of distribution. The land in the hands of the executors is still subject to dower and curtesy. And the whole scope of the *Conveyancing and Law of Property Act* passed in the same session, as far as it deals with limitations of estates, confirms this view. Note also the Statute Amendment Act of the same session (r), sections 24 and 25 of which speak of investments on mortgages of land held in fee simple.

That land is to be distributed as personalty, however, we have the authority of the Chancellor in the first case decided under the Act (s), where it was held that the widow of an intestate may elect to take an absolute one-third interest in the land in lieu of dower.

Without impugning the correctness of this decision, which does not enter very fully into the construction of the Act, we may be allowed to point out some very serious difficulties in the way of holding that land is distributable amongst the next of kin as personalty.

The first is a broad one, and the one most likely to suggest itself. It is that without even the formality in the Act of an express repeal of inconsistent enactments, a very great amount of real property statutory law must be

(r) 49 Vict. cap. 16.

(s) *Re Reddam*, postea, Occ. N.

repealed by implication. Writing from memory and a cursory mental glance, the whole of the *Real Estate Succession Act*, as far as it relates to the law of descent, is impliedly repealed, the greater part of the Short Forms Acts, as we shall presently see, is rendered useless, the Partition Act is repealed as far as partition amongst the obsolete race of heirs-at-law is concerned, the Dower Act undergoes very considerable modifications, the law of escheat is defunct, the equitable doctrine of conversion is probably extinct, and the whole body of real property law, by mere implication, undergoes the most extraordinary changes, the extent of which it is impossible to foresee, and which, indeed, is to be determined by judicial opinion only, and without the guide of those certain limitations for the protection and guidance of the owners of land which they have a natural right to demand without undergoing the expense and anxiety of a law suit to ascertain those rudimentary principles, which, upon such a radical change as this, should have been written clearly and distinctly for their guidance.

When we compare the extent of these ruins with the former (which we may perhaps be allowed to call the lesser) defect in the law, we may be pardoned for saying that it should be demanded of the Legislature that such a vast and radical change should not be attributed to it unless expressed in the most unambiguous and unequivocal terms.

There are grounds for believing that the Legislature did not intend, or at least were not aware of their intention (if the paradox is admissible) that realty should be distributable as personalty. By the Statute Amendment Act (t) passed in the same session, it is enacted as follows:—  
“Where a person dies in possession of, or entitled to, real estate in Ontario, intestate as to such real estate, without any known *heirs*, the Attorney-General may apply to the High Court for an order for the making of such inquiries as may be necessary to determine whether or not Her Majesty is entitled to any portion of the real estate of the

(t) 49 Vict. cap. 16, sec. 14.

deceased on account of his dying intestate and without *heirs*; and any judgment or order given upon such enquiry shall, unless reversed on appeal, be final and conclusive." And (2) "Where the Attorney-General is entitled to apply under the preceding subsection, he may bring an action, either in his own name, on behalf of Her Majesty, or in the name of Her Majesty, to recover possession of the real estate of the deceased, and shall be entitled to judgment and process to recover possession, unless the person claiming adversely shows that the deceased did not die intestate as to such real estate, or *that he left heirs*, or that some other person is entitled to the said real estate." Why should the Crown be defeated, it may be asked, by showing that there are heirs, if in fact heirs no longer succeed to the inheritance? It is impossible to harmonize this enactment with the *Devolution of Estates Act* unless we hold the heirs to be entitled, not immediately by descent as formerly, but mediately through the administrator after payment of debts. It is possible of course to go through the heroic process of forcing upon the word "heirs" a new meaning when speaking of estates in fee simple, but such a course would be entirely unwarranted.

In the same session, too, was passed the *Conveyancing and Law of Property Act* (u), to which we have already referred, and which deals with estates and tenures as if no change were made in the ultimate persons entitled to an estate in fee simple upon an intestacy. In dealing with the clauses of the Act relating to conveyances we meet with serious difficulties. By section 13, in a conveyance for valuable consideration there shall be deemed to be included the following implied covenants:—"Covenants for right to convey; Quiet enjoyment; Freedom from incumbrances; and Further assurance; according to the tenor and effect of the several and respective forms of covenants for the said purposes set forth in the schedules to *The Revised Act respecting Short Forms of Conveyances*, and therein numbered 2, 3, 4 and 5, respectively, subject to directions in

(u) 44 Vict. cap. 20.

the said schedule contained." It is hardly necessary to remind one that all these covenants are made with the *heirs* of the grantee and not with his personal representatives. The like provisions are made with respect to mortgages, and reference is made to the covenants set out in the Act respecting short forms of mortgages. There again we have the covenants for title, freedom from incumbrances, and so on, made with the heirs and not the personal representatives. And so it is with many of the covenants in a lease of a freehold estate under the Act respecting short forms of leases. We are then put in this position—either that the greater part of the short forms Acts is rendered useless, or that the Legislature never intended that an estate in fee simple should be diverted from the heirs upon an intestacy, save to the extent that the title should pass to them through the administrator. It is possible to allow the personal representative to sue on such a covenant as an "heir," and to hold the latter term to mean "next of kin" when construing the Act respecting Crown administrations, and to modify its meaning as occasion may "in the discretion of a good man" require. Such heroic treatment is, we say, possible. But was such a straining and creaking of the foundations of real property law ever intended? Is a new judicial code to be compiled to aid the draughtsman?

Again, tenancy by the curtesy does not appear to be abolished. Judging by former decisions (*v*) the husband will not be deprived of his estate if the wife die intestate, having acquired land since 1872. Any husband, if the *Devolution of Estates Act* had not been passed, whose wife died intestate entitled to such property would have been tenant by the curtesy. And he may still elect to take the interest which he would have taken if the Act had not been passed (*w*). If this be the correct construction, and it seems to be warranted, it may be necessary to define anew the requisites of an estate by the curtesy. One of them is

(*v*) *Furness v. Mitchell*, 3 App. R. 510, and authorities cited.

(*w*) See section 4, s.-s. 3.

that the wife should have issue born capable of inheriting. Under any construction of the Act, there is no such thing as "inheriting." The personal representative "succeeds" to the estate, he does not inherit. And though the heir might ultimately be entitled, he would claim mediately by conveyance from the administrator. Treating him as "inheriting" mediately through the administrator subject to payment of debts he might still fulfil the requirements of the rule. But if he takes merely a share in the distribution he claims directly from the administrator and would not claim by inheritance from his mother, and so could not be called "issue capable of inheriting." If the estate is distributable as personalty he is properly described as next of kin; but the mere existence of a person bearing that general relationship to the wife would not fulfil the requirements of such a highly technical rule of law as was that to which we refer.

We must not, however, overlook the fact that this may be used as a very strong argument in favour of the idea that tenancy by the curtesy is abolished. But we may safely say that either the Legislature did not intend to do it in this way, or that they did it so covertly as to evince a deliberate intention of veiling their own act.

What warrant is there, it may be asked, for dividing land amongst the heirs when the Act not only directs it to be distributed *as* personal estate, but also declares it to be in the hands of the personal representative "with all the like incidents, but subject to all the like rights, equities, and obligations, *as if the same were personal property* vested in them"?

A parallel may be found in the Short Forms of Mortgages Act, the distress clause in which raised a cognate question upon which the Judges differed widely. The words of this clause, as far as they are relevant, are "it shall be lawful for the mortgagee to distrain [for interest in arrear] upon the said lands, and by distress warrant, to recover by way of rent reserved, as in the case of a demise of the said lands, so much of such interest as shall be in arrear and unpaid, together with all costs attending such levy or dis-

tress, as in like cases for rent." In the mortgage which gave rise to the case of *Trust & Loan Co. v. Lawrason* (x), there was an attornment clause as well as the distress clause in question; and upon a seizure by an execution creditor the mortgagees claimed a landlord's right under the statute of Anne to a year's interest as rent. It was argued that "by way of rent reserved" meant "as being rent reserved," and that the interest was in fact rent when the whole scope of the mortgage was considered. But, after some conflict of opinion the case ultimately resulted in a decision to the contrary. As the reasoning against the mortgagees is worth considering in connection with the Act under review, we quote somewhat freely from the judgments.

Burton, J.A. (y). "What then is the effect to be given to this distress clause, which in its extended form is a covenant, declaration and agreement between the parties that if default should happen to be made in any part of the said interest at any of the days limited for the payment thereof, it should be lawful for the mortgagees to distrain therefor upon the lands, and by distress warrant to recover by way of rent reserved, as in the case of a demise of the said land, so much of the interest as shall remain in arrear, together with the costs, charges and expenses attending such distress as in the like cases of distress for rent? . . . Mr. Marsh argued with much ingenuity that the words 'by way of rent reserved' might be read 'as being rent reserved,' and referred to such an interpretation of these words in Webster's Dictionary; but the same authority gives a further interpretation, 'in the character of;' adopting either construction, it would seem to me that finding the words in this clause, and this clause only, looking at the whole instrument and finding there no reservation of rent, either expressly by reference or by implication, that there is the same form of expression as is used when there is no attornment clause, and when it is manifestly intended as a license

(x) 45 U. C. R. 176; 6 App. R. 286; 10 S. C. R. 679.

(y) 6 App. R. at p. 293.



to seize only, and looking also at the serious consequences as to third parties, we should be slow to place upon these words a construction they do not necessarily bear but hold them to confer a mere license rather than by implication to place it in the power of these mortgagees, as Blackstone says, 'to be their own avengers etc.'” And again, “It is also to be observed in this connection that the words of the clause are, ‘to recover by way of rent reserved’ *as in case of a demise* of the said lands, words quite inconsistent with this being a case of a demise at a rent reserved.”

Patterson, J.A. (z). “The distress clause authorizes the mortgagees to recover *by way of rent reserved, as in case of a demise* of the lands, etc., the arrears of interest. I have to confess my inability to read this as implying that a demise had before the default existed, under which the interest was the rent reserved. The language strikes me as negating any such construction. When the right to recover ‘as in the case of a demise’ is given—or, taking the full phrase, ‘to recover by way of rent reserved as in the case of a demise’—the assertion conveyed to my mind is, that there was no demise, and no rent reserved upon any demise, but that it was agreed that when a default occurred the remedy should be the same as it would have been in the case of a demise or when rent had been reserved upon a demise; and this is strongly enforced by the concluding words, which authorize the recovery of the costs ‘as in like cases of a distress for rent’;—in other words, ‘in the same way as if you were distraining for rent’.”

Strong, J. (a). In answer to the question what warrant is there for saying that arrears of interest are rent his lordship says :—“The only answer which can be suggested is, that the words ‘by way of rent reserved’ show that the interest is, so soon as it gets into arrear, to be considered as reserved rent; but this is to beg the whole question, for the words by way of rent reserved are not used in connection with the rent, but with the mode of recovering it; it is not said

(z) At p. 300.

(a) 10 S. C. R. at p. 700.

that interest in arrear is to be considered as rent reserved, but that when interest in arrear is to be recovered, it is to be so recovered in the same way that rent reserved on a demise is to be recovered, namely, by distress. And the latter words of the clause, providing that the costs of the distress shall be recovered 'as in like cases of distress for rent,' reflect light on the preceding expressions, and show, as clearly as language can express it, that the distress is not to be for rent, but for interest to be recovered in the same way as rent."

The result of the case is that the provision in the Act gives only that means or mode of recovering interest which is used for the recovery of rent, and does not attach any of the qualities or characteristics of rent to interest. The difference of opinion amongst the Judges in this case makes it a very unsatisfactory authority, but the majority are in favour of the final result.

Applying this to the act under review we may base upon it the argument that realty is to be distributed in the same manner, by the same mode, or through the same channel as personalty. Personalty always devolved upon the executor or administrator through whom title was claimed by the legatee or next of kin. Realty always devolved upon the heir who claimed directly by descent from his ancestor. Under the present act, if he claims at all, he must claim in the same way as if he were claiming personalty, that is, through the administrator. And a devisee too, must, it is conceived, take by conveyance from the executor.

Again the expression in the ninth section of the act—"as if the same were personal property vested in them" forms the foundation of exactly the same argument as was used in *Trust and Loan Co. v. Lawrason*. One would naturally desire language to be clearer than that which has been furnished to us; but perhaps complaint should not be made respecting so fruitful a source of argument and contention as this act undoubtedly is.

There are many other points of importance which arise out of this act, reference to which must be deferred for the present. We will mention shortly but one—not of much

practical importance perhaps, but of great theoretical interest.

It is (or rather it was) a fundamental principle of law that the freehold should not be in abeyance. But under the present act if a man dies intestate, or if his executor renounces, where is the legal estate in the land before the appointment of an administrator ?

## EDITORIAL REVIEW.

**Choses in Action.**

Men are apt to generalize. From constantly associating a particular designation with the more frequently recurring objects of their class, arises a tendency to denote those objects as forming the class to the exclusion of others that properly belong to it.

In *Colonial Bank v. Whinney*, L. R. 11 App. Ca. 439, Lord Blackburn takes the opportunity of correcting an error which seems thus to have arisen from the use of the term *chose in action*. "The principal argument," said his Lordship, "used by the counsel for the respondent, and it seems to have prevailed both with Cotton, L. J., and Lindley, L. J., was that 'choses in action,' of which things in action is a translation, had a technical sense in our old law limited to the right to sue for a debt or damages. I do not think that made out. There always was a difference between personal property, such as to be capable of being stolen, taken, and carried away, and so to be the subject of larceny at common law, and to be capable of being seized by the sheriff under a *fi. fa.*, and other kinds of personal property. Personal property of the first sort, when belonging to a married woman, vested at once in the husband. The others the husband might reduce into possession, but did not have till he had done so. And when new kinds of property, like stock in the funds, or in more modern times shares in companies, were created, questions arose as to whether they were within the principle of being in possession or not; but till the phrase was used in the Act of 1869, it never became important to inquire whether they were to be called things in action or not. But it is noticeable that in *Dundas v. Dutens*, 2 Ves. Jr. 196, Lord Thurlow, speaking of stock

or the funds, said : ‘ These things, such as stock, debts, etc., being choses in action are not liable. They could not be taken upon a *levari facias*. The reason was the same as that for which they could not be the subject of larceny at common law, because they could not be seized. But Lord Thurlow thought choses in action an apt expression to use with respect to such things. Again, shares are not within the 17th section of the Statute of Frauds, because they do not pass by delivery ; Lord Denman, in *Humble v. Mitchell*, 11 A. & E. 205, thought choses in action a proper phrase to express that idea. Again, in *Ex parte Agra Bank*, L. R. 3 Ch. 555, 560, Wood, L. J., in speaking of an assignment of shares, uses the phrase ‘ whether in an assignment of a chose in action.’ He had no need to inquire whether it was a strictly correct phrase, but to him it appeared, as it had done before to Lord Thurlow and Lord Denman, that the phrase expressed the idea. And I think it was hardly disputed that in modern times, lawyers have accurately or inaccurately used the phrase ‘ choses in action ’ as including all personal chattels that are not in possession.”

#### **To our Readers.**

We enter upon the seventh year of our existence under favourable auspices. Though we are conscious of many defects in the CANADIAN LAW TIMES, we believe, if we may credit a constantly increasing subscription list, that it is on the whole favourably viewed by those in whose interests it is published.

We have had many things to contend against, and have not always been able to overcome the obstacles, but we have made fair progress towards the object originally aimed at.

In placing before our subscribers notes of cases decided in the various Provinces before they could be seen elsewhere, in bringing the decisions of one Province before the profession of another Province, who probably but for this would never have seen them, in short in making the

occasional notes of cases a compendium or abstract of the current case law of the Dominion, we believe we are performing a substantial service to the profession at large.

In this respect we purpose for the future to make the CANADIAN LAW TIMES more useful than ever. We have made arrangements for the publication at greater length and with greater particularity of notes of Ontario practice cases, and for the publication in full of reports of such cases as are of universal importance, keeping up, as heretofore, the notes of cases from the various other Provinces.

With this number we present our notes of cases in new type. Though the volume will on this account be somewhat more bulky, the notes will be more easily read, and will present a more pleasing appearance to the eye. We retain the name "Occasional Notes," as the number of decisions vary and we could not promise a regular issue at shorter periods than a month; but we shall issue notes of cases in smaller parts than heretofore and more frequently. The paging of the Occasional Notes will from this time be separate from the paging of the journal proper.

To our friends in the Provinces other than Ontario we would say, that Ontario should not stand almost alone in supplying leading articles. She by no means monopolises the literary ability of Canada, nor does she comprehend all the capable lawyers. We would gladly receive contributions of leading articles from the other Provinces, and we hope that our friends will bestir themselves and write.

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# THE CANADIAN LAW TIMES.

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VOL. VII.

FEBRUARY, 1887.

No. 3.

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## VICE-ADMIRALTY JURISDICTION: POSSESSION— RESTRAINT—CO-OWNERSHIP.

**T**HE High Court of Admiralty anciently exercised a wide jurisdiction over questions of ownership of and title to ships and the right to possession of them. It was for a long time held to be within its powers to examine into and decide questions of disputed title, but in its unsuccessful contest within the Superior Courts, the latter prohibited it from entertaining such questions. As early as 1774 in the case of *Meeke v. The Lord Holland* (a), this prohibition was recognized by Sir G. Hay, then Judge of the High Court of Admiralty. In that case Meeke and others, alleging that they were owners of a majority of the shares of "*The Lord Holland*," sought to have the Master appointed by the other owners dispossessed, and the ship delivered to the Master appointed by them. The petitioners' title was disputed, and the court declined to interfere until the question of title was determined by the Court of Chancery. The earlier jurisdiction of the court was, however, restored by 3 & 4 Vict. cap. 65, ("An act to improve the practice and extend the jurisdiction of the High Court of Admiralty of England") section 4 of which is as follows:—

"And be it enacted that the said Court of Admiralty shall have jurisdiction to decide all questions as to the title

(a) *Marsden's Ad. Cas.* p. 145.



to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry, arising in any *cause of possession*, salvage, damage, wages or bottomry, which shall be instituted in the said court after the passing of this Act."

As no such provision is contained in the Acts extending the jurisdiction of Vice-Admiralty Courts, and as they have therefore no greater jurisdiction than was possessed by the Statute referred to, it is important to consider the limitations of the jurisdiction of the High Court prior to the statute.

*The Aurora (b)*, decided in 1880 by Sir W. Scott, was a cause of possession brought against the master and owner of a vessel by a merchant claiming title under a bill of sale, absolute in form, but given as a security for a debt. The Court, holding that the plaintiff's title was not clear and indisputable, superseded the warrant which had been issued for the arrest of the vessel. "It is well known that it was formerly held, for a very long time, and down to no distant period, to be within the jurisdiction of this court to examine and to pronounce for the title of ships on questions of ownership. It was not till some time after the Restoration, I believe, that it was informed by other Courts that it belonged exclusively to them; since that time the Court has been very cautious not to interfere at all in questions of this nature. *Where the consideration of property arises incidentally, and in such a manner as is not disputed between the parties*, the Court can hardly be said to judge on the matter of property, as being a matter of question. The present action being to dispossess the master at the suit of an owner, it is impossible for one to say that there is a sufficient *constat* of property for the purpose established" (c).

In *The Sisters (d)* (1862), the court was of the opinion that it should not enforce the legal title under a bill of sale against an equitable title, but leave the parties to find their proper remedies in a Court which can look into the whole of the transaction.

(b) 3 C. Rob. 133.

(c) See also *The Guardian*, 3 C. Rob. 94.

(d) 4 C. Rob. 276.

The opinions expressed in *The Aurora* are repeated in an ampler manner in *The Warrior* (e), decided by the same Judge in 1818. He adds a limitation, however, to the general rule that the Court will not investigate questions of disputed title. "A question of title may occur incidentally in a cause of possession, and it then becomes necessary for a Court to enquire into the title, at least so far as to satisfy itself that it may safely decree possession to the party seeking it. It cannot be laid down that the Court is to decline its jurisdiction in a cause of possession on the mere averment of one of the parties that there is a conflicting title. If the mere averment of title without any examination into its foundation, would be sufficient to arrest the progress of a cause, the jurisdiction of the Court over causes of possession would be ousted altogether. . . . The nature of the title must be shewn before it can be permitted to have the effect of arresting the cause in its progress. It must be made to appear that it is not a mere cob-web title that is set up, but that it is such as to raise a real and substantial doubt to whom the property belongs; and, in that case, the Court would certainly decline to interfere as to the possession, until the title should have been determined upon by the Courts in which such questions have been more usually agitated in the modern practice of the law."

Again, in 1824, the original owners of a ship, which had been sold by the Master abroad, sought to recover possession from the purchaser, alleging that the sale was fraudulent (f). Lord Stowell in delivering judgment said:—"The case then is, in reality, an inquiry into the title of the present asserted proprietor to hold the ship, and the first, I had almost said the only question is, how far this Court is authorized to make this inquiry, and provided with due powers to make it with effect. The Court is certainly in the habit of transferring possession from the actual holder, sometimes by its own movement, sometimes at the instance

(e) 2 Dod. 238.

(f) *The Pitt*, 1 Hagg. 241.

of other Courts which have no direct power for that purpose ; but it considers itself, and is bound to consider itself, as moving within very narrow limits, if it proceeds at all originally upon a question of title. It undoubtedly would not be inclined, in any case, to transfer a possession without regarding the title of the party who claims the transfer ; it must be satisfied that he is *potior jure* ; and it must be in cases extremely simple that it acts on a mere preferable title to be reached by its own judgment. *Where the possession is gained by force and violence, or by a fraud manifest on the very face of the transaction ; or where the party in possession is avowedly entitled only as a minor owner in opposition to the majority of interests*, there the Court feels no hesitation ; but where a course of transactions involving fraud is objected, it declines entering into the question, and leaves it to be determined by the enquiry of Courts which have ampler means of arriving at the real truth, and the real justice of the case ; for there may be some incidental matters, such as repairs and other expenses, requiring the application of equitable principles which this Court may not feel itself competent to administer. I may, therefore, lay it down as a rule for the conduct of this Court, that it is only in simple cases, in cases which speak for themselves that it can act with effect ; but in those which being complex, require a long and minute investigation, it cannot proceed with safety" (g).

The same question was discussed in 1830, before the High Court, upon an appeal from a decision of the Vice-Admiralty Court of Gibraltar (gg), in the case of *The John* (h), and the principles of limitation of the jurisdiction laid down in *The Warrior* and *The Pitt*, referred to and approved of as applicable also to Vice-Admiralty Courts. In *The Victoria* (1859), a cause of possession was brought against the master by the registered owner of 36 shares. The master was the registered owner of 28 shares, and claimed to be the equit-

(g) See also *The Fruit Preserver*, 2 Hagg. 181 ; *The Lister*, 4 C. Rob. 275.

(gg) This appellate jurisdiction was by 26 Vict. cap. 24, sec. 22, transferred to Her Majesty in Council.

(h) 2 Hagg. 305.

able owner of four more. The Court (Dr. Lushington) held that upon the evidence the master was the equitable owner of the four shares. "It is important to consider on what foundation the jurisdiction of the Court stands, and within what limits it is circumscribed. Causes of possession always belonged to the Court of Admiralty, but such jurisdiction was very limited; if questions of title arose, the Court declined to proceed further. It pleased the Legislature, however, to enlarge the jurisdiction by enabling the Court in causes of possession to try questions of title (i). I have no doubt therefore of my authority to try questions of legal title, but how far I should be justified in trying an equitable title is another question. It was said by Lord Stowell that the Court exercised an equitable jurisdiction, and in one sense of the term I do not doubt it; but how far is the Court competent to enforce rights of technical equity, such as trusts? I need not give a complete answer to this question, for I apprehend that there is a distinction between enforcing an equitable right at the instance of the party claiming such right, and refusing to enforce a claim of a legal owner to the disregard of an equitable right."

It will be well, therefore, to review the cases in which the jurisdiction has been upheld.

The Court will undoubtedly exercise jurisdiction to take a ship from a wrong-doer and deliver her over to the rightful owner; and in such a case the Court of King's Bench refused to prohibit the High Court of Admiralty from proceeding (j). This subject was discussed by the Hon. Henry Black, Judge of the Vice-Admiralty Court at Quebec, in *The Haidee* (k), decided in 1860. Certain justices of the peace at Quebec acting clearly without jurisdiction, had issued warrants for the arrest of a vessel, which four years afterwards were enforced against the ship, which had then passed into the hands of a *bona fide* subsequent purchaser. The Court held that it was a cause of possession within its

(i) 3 & 4 Vict. cap. 65, sec. 4.

(j) *Re Blanchard*, 2 B. & C. 244; 3 D. & R. 177.

(k) 2 Stuart, 25.

jurisdiction, but finding that the plaintiff (a bailiff acting under the warrants) had no right to seize the vessel, dismissed the case and discharged the bail given by the owner in the cause with costs (*l*).

The Court has also jurisdiction apart from statute to dispossess a master at the suit of the owner. If the master is not a part owner, and if the majority of the owners declare their disinclination to continue him in possession the Court will dispossess him (*m*). In such a cause it is not competent to him to dispute the title of the registered owners and allege a title in other parties; but if he do so the Court will give further time for the appearance of the alleged owners (*n*). By the majority of owners, is meant the majority in interest. The Court will not enter minutely into the causes of the dissatisfaction (*o*). If the master is also part owner, some special reason for dispossessing him must be shewn, as, for instance, that he is irregular in his accounts with the owners (*p*). *The Windsor Castle* was decided in 1841, prior to the statute which gave a master a lien for his wages and disbursements (*q*). The judgment proceeds expressly upon the ground that the master had no such lien. But the lien of the master being maritime and not

(*l*) An instance of a simple case of title, which though decided upon the Statutes 3 & 4 Vict. cap. 65, ss. 3 & 4 and 24 Vict. cap. 10, sec. 11, by the High Court, might, it is submitted, have been considered as within the jurisdiction of the Court apart from statute, will be found reported in L. R. 4 A. & E. 6. There the ship, *The Rose*, had been mortgaged. After the mortgagor's death, she was sold under the mortgage, and a bill of sale duly made to the purchaser, who, thinking it necessary to complete his title, procured a receipt for the mortgage debt to be endorsed on the mortgage, and by mistake taken to the Custom House and duly recorded. Afterwards the bill of sale was presented for registration, which was refused on the ground that the registration of the receipt discharged the mortgage, and re-vested the ship in the mortgagor, or his representative. A cause of possession was instituted and the ship arrested. No appearance was entered. The mortgagor had died intestate, and no administrator had been appointed. The Court (Sir Robert Phillimore), pronounced the plaintiff to be owner, and entitled to be registered as such, and decreed possession to be delivered to him.

(*m*) *The New Draper*, 4 C. Rob. 287; *The Aurora*, 3 C. Rob. 133; *Bowen v. Fox*, 10 B. & C. 41.

(*n*) *The Windsor Castle*, 1 Notes of Cases 118.

(*o*) *The See Reuter*, 1 Dod. 23; *The Kent*, Lush. 495; *The Johan and Siegmund*, Edw. 242.

(*p*) *The New Draper*, *supra*.

(*q*) 17-18 Vict. cap. 104, sec. 191.

dependent on possession, it is not very clear why the existence of such a lien should affect the question (r):

The jurisdiction in such cases is extended by section 240 of the Merchant Shipping Act, 1854 (s), which enacts as follows :

“ Any Court having Admiralty jurisdiction in Her Majesty’s Dominions may upon application of the owner of any ship being within the jurisdiction of such Court, or by the part owner or consignee, or by the agent of the owner, or by any certificated mate, or by one-third or more of the crew of such ship, *and upon proof upon oath to the satisfaction of such Court that the removal of the master of such ship is necessary*, remove him accordingly ; and may also, with the consent of the owner or his agent, or the consignee of the ship, or if there is no owner or agent of the owner or consignee of the ship within the jurisdiction of the Court, then without such consent, appoint a new master in his stead ; and may also make such order and may require such security in respect of costs in the matter, as it thinks fit.”

This provision was interpreted by Dr. Lushington in the case of *The Royalist* (t) decided in 1863. That was an action brought by the owner of a moiety of the shares of the ship. Sixteen other shares were held by one Thompson, and the remaining sixteen by one Burnicle. It was agreed that Thompson should be ship’s husband and Burnicle master. The ship went ashore whilst on a voyage under Burnicle as master, and he paid £5 for services rendered in getting her off, but took a receipt for £25. In his reports to the managing owner, the insurance company, and in his protest, he stated that he had paid £25. Thompson though aware of his misconduct refused to discharge him, and the action was brought for the purpose of having him removed. The Court held that these facts shewed that his removal was *necessary* within the meaning of the section. It also held that the previous section (239) which

(r) *The Brisk*, 4 Ben. 252.

(s) 17-18 Vict. cap. 104.

(t) Br. & L. 46 ; 32 L. J. Ad. 105.

makes certain offences of the master punishable as misdemeanors, does not limit the powers of the Court. So it has been held that ordering goods in disobedience to the owner's commands (*u*), making a secret agreement with a charterer to be paid a commission out of the freight (*v*), are acts of misconduct, justifying the master's removal.

The jurisdiction in causes of possession is also exercised in cases of disagreement among co-owners of a ship. If a majority of the owners desire to employ the ship, but the minority have possession and decline to let her go, or where the majority are dissatisfied with the management and employment of the vessel, the Court will decree possession to be given to the majority (*w*). But security for the safe return of the ship equal to the value of their interest must be given to the minority (*x*). The Court will not withhold possession from the majority even if the minority in possession offer full security for their interests (*y*). Part owners who do not join in the suit, are presumed to be content that the possession of the ship should not be disturbed (*z*). The American Courts have held that where the majority refuse to employ the vessel, possession will be given to the minority for the purpose of employment on security being given to protect the dissentient owners (*a*). The owners who dissent from the employment of the ship whether in causes of possession or restraint are not liable for any of the expenses of the outfit or voyage, nor entitled to any share of the profits. All they are entitled to is the safe return of the ship in good condition, ordinary wear and tear excepted, or if lost to payment of the value of their shares (*b*).

(*u*) *The Princess Helena*, Lush. 190.

(*v*) *Brennant v. Prestow*, 2 De G. M. & G. 813.

(*w*) *The John*, 1 Hagg. 342; *The Elizabeth and Jane*, 1 W. Rob. 278; *The Valiant*, 1 W. Rob. 64.

(*x*) *The Apollo*, sup.

(*y*) *The Kent*, Lush. 495; Henry, pp. 55-62.

(*z*) *The Valiant*, 1 W. Rob. 64.

(*a*) Henry, 56, citing *The Orleans v. Phoebus*, 11 Peters, 175; *Trumo v. The Betsina*, 5 Am. Law Reg. 406.

(*b*) *The Apollo*, sup.; *The Peggy*, 4 Rob. 304; *The Robert Dickenson*, L. R. 10 P. D. 15; *The Margaret*, 2 Hagg. 275.



*Restraint.*—The converse of the class of causes of possession last referred to, is found in what are known as causes of *Restraint*. In these causes the application is made, not for possession of the ship, but to procure security for its safe return on behalf of those owners who dissent from its proposed employment. Upon it being shewn that the majority are about to send the ship on a voyage against the will of the minority, the ship will be arrested and detained until security is given for its safe return. The bail bond required is simply for the appraised or agreed value of the plaintiffs' shares in case the ship does not return to the particular port named in the bond (c). The Court has jurisdiction to arrest the vessel at the suit of a part owner holding a minority of shares, notwithstanding that the vessel is about to proceed on a voyage approved of by a majority of the part owners under a charter entered into by the ship's husband appointed to act on behalf of all the owners (d). A mortgagee not in possession cannot, unless his security will be imperilled, maintain a cause of restraint (e), nor can the holder of a bill of sale absolute in form but intended as a mortgage (f). Upon the safe return of the vessel to some port within the jurisdiction—though not the port named in the bond—the Court would, it seems, refuse an application to declare the bond forfeited. In *The Margaret* (g), a bond had been given for the safe return of the vessel to the port of Hull. She had, after a voyage from Hull to Riga, returned to the port of London. A second bond was then given to another part owner, and the vessel sailed to Quebec, and upon her return, having met with much bad weather, she was carried in distress into Plymouth where she was arrested in suits of salvage and of wages. An application was then made to the High Court to pronounce the first bond forfeited. The Court (Sir C. Robinson) declined to do so, saying, "The bond prescribes an obligation to bring back the vessel; and in some bonds, particularly

(c) *The Robert Dickenson*, L. R. 10 P. D. 15.

(d) *The Falca*, L. R. 5 P. D. 169.

(e) *The Highlander*, 2 W. Rob. 109; *The Tunisfallen*, L. R. 1 A. & E. 72.

(f) *The Tunisfallen*, sup.

(g) 2 Hagg. 275.



in that which is printed in the Appendix of Abbott, the terms are general, 'to return,' without mention of any particular port. And it may be questionable whether that may not be the proper remedy. When a vessel is within the protection of the country to which she belongs, she is in her general home; and the parties are restored, as to any legal remedies, to the situation in which they stood before the departure of the vessel." In case of loss, the bond will be declared forfeited, and the amount named in it, or the value of the plaintiff's shares ordered to be paid (*h*). The dissentient owners are not entitled to any share of the profits of the voyage, or bound to bear any loss beyond the ordinary wear and tear of the ship.

*Co-ownership.*—The jurisdiction in cases of disagreement or disputes between co-owners has been materially affected by the provisions of the "Vice-Admiralty Courts Act, 1863;" although here again it is necessary to contrast the provisions of the "Admiralty Courts Act, 1861" on the same subject. Prior to the passing of the latter Act, the High Court of Admiralty had no power to direct the sale of ships in cases of disagreement among the co-owners, nor to enter into questions of account between them. But by section 8 of "The Admiralty Courts Act, 1861," (*i*) it was enacted that "The High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment and earnings of any ship registered at any port in England or Wales, or any share thereof, *and may settle all accounts outstanding and unsettled between the parties in relation thereto and may direct the said ship or any share thereof to be sold, and may make such order in the premises as to it shall seem fit.*"

The "Vice-Admiralty Courts Act, 1863," (*j*) declares that Vice-Admiralty Courts shall have jurisdiction over:—  
 "(9) Claims between the owners of any ship registered in the possession in which the Court is established, touching the ownership, possession, employment, or earnings of such ship."

(*h*) *The Apollo*, 1 Hagg. 312; *The Margaret*, 2 Hagg. 275.

(*i*) 24 Vict. cap. 10, sec. 8.

(*j*) 26 Vict. cap. 24, sec. 10 (9).

It, however, contains no provisions similar to those cited from the Act of 1861, conferring power to order a sale of the ship and to settle accounts between the owners.

Under the 8th Section of the Act of 1861, above cited, the Court granted a citation *in personam*, at the instance of two owners, against a third, and a monition on the London Dock Company to bring in freight in their hands, upon which a stop order had been put by the defendant by serving a notice on the Dock Company under the Merchant Shipping Act Amendment Act, 1862 (k). Under the same section, the Court also entertained a suit *in rem* brought by a plaintiff who had sold his shares in the ship to a third person, to have an account taken between himself and the defendant, the owner of the remaining shares, in relation to the employment and earnings of the ship during the time he and the defendant were co-owners. The fact that the plaintiff had sold his shares prior to the institution of the suit, was held not to oust the jurisdiction conferred by the Act (l). In the *Idas* (m) it was held that the Court might order an account to be taken relating to a ship lost before the institution of the cause; and that the Court will entertain a suit for an account only. In this case (decided by Dr. Lushington in 1863) the Court remarked in reference to the jurisdiction to take an account of earnings between co-owners:—"With respect to the employment of ships, all that this Court could do was, if the majority of the owners determined to send the ship to sea, to require them to give security to the minority to the extent of their shares for its safe return. As to the earnings of the ship taken simply, the Court had no jurisdiction at all. Such was the former state of the law. If, however, I rightly understand the argument of the defendant for a limited construction (of sec. 8 of the Act of 1861) it is this, that the Court has not by virtue of the section, authority to take any accounts, save in cases of disputed ownership, possession or employment. Now this construction arbitrarily and without reason, strikes out of the statute the

(k) 25 & 26 Vict. cap. 63; *The Meggie*, L. R. 1 A. & E. 77.

(l) *The Lady of the Lake*, L. R. 3 A. & E. 29.

(m) Br. & L. 65.

word 'earnings,' and there is no explanation suggested *how* the Court could deal with the earnings of a ship without *taking an account.*"

The legislation on this subject was discussed by Sir William Young in the case of *The W. E. Weir*, decided by him in 1873 (n), in which referring to section 10 (9) of the Vice-Admiralty Courts Act, he says: "These words are used in the Act of 1861, 24 Vict. cap. 10, sec. 8, giving a like jurisdiction for the first time to the High Court of Admiralty, but adding that the Court may settle all accounts, etc., (repeating the section). *This is one of the cases which has occasionally occurred in this Court when its restricted power, as compared with that of the High Court of Admiralty, has worked injury to suitors, and made the wisdom or motive of the restriction difficult to fathom.*" His Lordship held that though the Court might have an implied power to take an account of the earnings, as suggested by the words of Dr. Lushington in *The Idas* (o), it had no power to cancel erroneous or illegal registries, or order a sale of the ship. It is difficult to see how the jurisdiction conferred by this Act can be exercised satisfactorily without the additional powers conferred on the High Court by the Act of 1861 (p).

The "Merchant Shipping Act, 1854," (sections 62-65 inclusive), provides that whenever the property in a British ship or any share devolves upon or is transmitted to a person unqualified under the Statute to be an owner of a British ship, on the death of an owner or the marriage of a female owner, if the ship is registered in any British possession, any Court possessing the principal civil jurisdiction within such possession, may order a sale of the property so transmitted. These powers have not been extended to Vice-Admiralty Courts.

It remains to be considered how far the powers and remedies above described, will be exercised, and applied in

(n) Young's Ad. Dec. 145.

(o) Br. & L. 68.

(p) By the Maritime Jurisdiction Act, 1877, it is enacted that the jurisdiction of the Maritime Court of Ontario, in respect of claims touching the ownership, possession, employment, or earnings of ships, shall extend to the case of a ship registered in a port in the Province of Quebec, but navigating the waters referred to in the Act.

the case of foreign ships. The statutory jurisdiction in causes of co-ownership is restricted to vessels registered in the possession in which the Court is established (*q*).

The term "possession" is not defined in the "Vice-Admiralty Courts Act, 1863," but in the "Merchant Shipping Act, 1854" (*r*), it is declared that in the construction, and for the purposes of that Act, "British possession" shall mean "any colony, plantation, island, territory, or settlement within Her Majesty's Dominions and not within the United Kingdom." By "The Merchant Shipping (Colonial) Act, 1869" (*s*), to this definition is added, "and all territories and places *under one legislature* (meaning thereby the central legislature, where there are local legislatures also), are deemed to be one British possession for the purposes of this Act." By Section 7 of the same Act, it is declared that in the construction of the "Merchant Shipping Act, 1854," and amending Acts, Canada shall be deemed to be one British possession. In *The Three Sisters* (*t*), Sir William Young decided that the ports of the Dominion of Canada are to be accounted home ports in relation to each other, and that a bottomry bond given on a Dominion vessel in a Dominion port cannot be enforced in the Admiralty, basing his decision on the provisions of the "Merchant Shipping (Colonial) Act, 1869," above referred to. But in 1880, the Vice-Admiralty Court of Quebec expressly held in the case of the *Edward Barrow* (*u*), that under the Vice-Admiralty Courts Act, 1863, Canada is not a "possession" so as to enable a Court in one Province of it to entertain a cause of possession in respect of a vessel registered in another Province. The Maritime Jurisdiction Act, 1877 (*v*) expressly extends the jurisdiction of the Maritime Court of Ontario to ships registered in Quebec, but navigating the Ontario waters.

The High Court of Admiralty has no jurisdiction to entertain a course of *Restraint* at the suit of a British part-owner against a foreign vessel, although it might possibly

(*q*) 26 Vict. cap. 24, sec. 10 (*9*).

(*s*) 32 Vict. cap. 11, sec. 2.

(*u*) Cook, 212.

(*r*) 17 & 18 Vict. cap. 104, sec. 2.

(*t*) 2 Stu. 370 (A. D. 1873).

(*v*) 40 Vict. cap. 21, sec. 2 (*3*) (*D*).

do so if it were shown that the law of the country to which the ship belongs were the same as that administered by the High Court in such cases (*w*).

The High Court in general declines to interfere in a cause of *Possession* between foreigners without the consent of the parties, or sanction of the representative of the foreign state. But where a majority of the owners of a foreign ship, who had obtained a decree for possession against the master, who was also part-owner, instituted a suit in the High Court to dispossess the master, it was held that the judgment of the foreign Court was sufficient to justify the High Court in proceeding with the case (*x*). Upon the application of the representative of the foreign state, and with the consent of parties, the Court will entertain the cause, but with reluctance, and only to prevent inconvenience and loss (*y*). In *The Johan and Siegmund* (*z*), the Court declined to entertain the suit, in the absence of consent of parties and the accredited agent of the country to which they belonged; and in *The Agincourt* (*a*), the Court dismissed an action of co-ownership, brought by a foreigner against a foreign ship, it appearing that the representative of the foreign state declined to interfere. In *The Experimento* (*b*), British subjects instituted a cause of possession against a vessel which had been sold under the decree of the Admiralty Court at Savannah, in the United States, and purchased by a Spanish firm. The plaintiffs were the executors of the original British owner. The Court held that it had jurisdiction to enquire into the matter, but the vessel having been sold under the decree of a foreign Court of competent jurisdiction, the action was dismissed. In this case the real question was whether the ownership of a British ship had passed to foreigners.

Z. A. LASH.

R. GREGORY COX.

(*w*) *The Graff Arthur Bernstorff*, 2 Sp. 30.

(*x*) *The See Reuter*, 1 Dod. 24; *The Evangelistria*, 2 P. D. 241 n.

(*y*) *The Martin of Norfolk*, 4 C. Rob. 293.

(*z*) Edw. 242.

(*a*) L. R. 2 P. D. 239.

(*b*) Br. & L. 38.

## EDITORIAL REVIEW.

**University Education and Law.**

“No more startling bolt from the blue,” says the *Scottish Law Review*, “has recently descended upon the Scottish legal world than the Act of Sederunt of 4th November, 1886. That Act declares that it shall not be necessary for the future that any applicant for admission as a law agent shall have attended the classes of Scots Law and Conveyancing in a Scottish University, with the saving clause—which is susceptible of more than one interpretation—that it shall be in the power of the examiners, in conducting the examination of such applicant for admission, to take into account whether such applicant has or has not attended such classes. The effect of this Act is at once seen: henceforth—assuming that no Act of the Imperial Parliament or Amending Act of Sederunt intervenes—it is not necessary that the solicitors or writers of Scotland should ever have entered the gates of a university.”

Then follows a lament that this backward step should have been taken. It certainly does seem strange that where high qualifications were already necessary, a lower standard should have been deliberately fixed. For, learned as a student may be in his law curriculum, there is no reasonable doubt that he does not reach the standard of a more liberally educated man. It is true, as the *Review* says, that lawyers cannot know too much. There is no species of knowledge, however lowly and apparently unimportant, that some day does not become useful to a lawyer in active practice. And a liberal education before the study of law is commenced not only brings a man to his task better prepared for it, but furnishes him with useful weapons subsequently in the practice of his profession.

**Scotch Solicitors Abroad.**

Some time ago a Scottish law agent went to Australia and demanded the right to practise in Queensland without conforming to the regulations of the Colony. His application was refused. It now appears, according to the *Scottish Law Review*, that he has tried to circumvent the Courts by an ingenious manœuvre. After his refusal, he went to Victoria where the same objection did not prevail as prevailed in Queensland, and was there admitted in due course. As between Victoria and Queensland there is free trade in solicitors, those of either colony being entitled to admission in the other. Being now a Victorian solicitor, he again applied to the Supreme Court of Queensland for admission in his new capacity. The Chief Justice, however, characterized his second application as an attempt to evade the rules which had been laid down there for admission, and remarked that "a lot of men had been qualified in Scotland as law agents at one swoop by Act of Parliament. That might satisfy the people at home, but it would not satisfy that Court. In this case they knew nothing of the qualifications of the applicant; they only knew that a very inferior class of practitioners came out as law agents. The rules meant that they recognised the carefully trained Victoria solicitor as eligible, and they also recognised the certificates of the Superior Courts at home. Beyond that they would not go."

Old country solicitors, so far, have not made very great advances towards satisfying Colonial Courts of their qualifications.

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# THE CANADIAN LAW TIMES.

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MARCH, 1887.

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## TENANCY BY THE CURTESY AS AFFECTED BY LEGISLATION.

THE position of a husband with respect to his wife's real estate has for some time been a difficult one to ascertain, on account of the obscurity of the several Acts respecting the separate estate of married women before the revision of the statutes, the changes made therein upon the revision of the statutes in 1877, and the passage of the Married Women's Property Act of 1884, which repealed all previous Acts. Without pretending to clear up all points in dispute, we propose to put before our readers a construction of the various Acts, based upon the principles laid down both in England and Ontario with respect to the powers of married women over their separate estate (upon which the estate by the curtesy largely depends), applying these principles chronologically to the statutes as they appear in the books, and endeavouring to classify the cases in which the estate by the curtesy still exists at all events, those in which it is at the mercy of the wife, and those in which it is completely abolished by statute—if indeed that consummation has been reached.

Common opinion seems to rest upon the supposition that the existence or non-existence of the estate by the curtesy depends upon the absence or presence of express words touching it in the statutes relating to the real estate of



married women. But a perusal and consideration of the leading authority on the Act of 1872 (a), and especially of the case of *Cooper v. Macdonald* (b), upon which great reliance was placed by the Chief Justice of Ontario, will show that it depends almost entirely upon the nature or quality of the estate of the wife in the land, and upon her power of dealing with it. It will therefore be necessary to consider to some extent the position in law of married women with respect to their real estate under our legislation.

The first Act respecting the property of married women was the Consolidated Statute of 1859 (c), which was designed for the protection of married women in respect of their real and personal property, and the relief of their husbands from liability for their debts.

"The primary objects of this Act," said Draper, C.J., "seem to be—first, to protect a married woman in the right to her separate property free from the debts and the control of her husband; second, to secure her earnings to herself under certain circumstances; third, to enable her creditors to obtain satisfaction out of her separate property for debts incurred *dum sola*; and lastly, to relieve the husband from liability for such debts, though he must be joined in the action against her if he be resident in the province" (d).

The first section enables every woman married after 4th May, 1859, "to have, hold and enjoy all her real and personal property, whether belonging to her before marriage, or acquired by her, by inheritance, devise, bequest or gift, or as next of kin to an intestate, or in any other way after marriage, free from the debts and obligations of the husband, and from his control or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried." The second section applied to women married before 4th May, 1859, and gave them similar rights respecting their real estate not then, that is on 4th May, 1859, taken possession of by their husbands.

(a) *Furness v. Mitchell*, 3 App. R. 510.

(b) L. R. 7 Ch. D. 288.

(c) Cap. 73.

(d) *Kraemer v. Gless*, 10 C. P. 475.

The decisions upon this Act never extended the powers of married women beyond the holding and enjoying of their property. And though it was said in one case (we believe by Mowat, V.C.,) that in order to "enjoy" property it is necessary to have a disposing power over it, the right to dispose of land as a *feme sole* was never accorded to any married woman coming within the purview of this Act (e). The canon of construction laid down by Draper, C.J., in dealing with this Act is frequently referred to, and it was apparently in obedience thereto that a rigid construction was placed upon it. His Lordship is reported to have said (after referring to the objects of the Act above quoted), "Every provision for these purposes is a departure from the common law, and so far as it is necessary to give these provisions full effect we must hold the common law is superseded by them. But it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the Act was intended to give" (f). And so, in the same case, it was determined that the Act did not enable a married woman to bind herself as a *feme covert* to a greater extent than she was able to do before the passing of the Act. Nor was the law altered respecting the conveyance by married women of their real property (g).

Perhaps these considerations alone might have been weighty enough to have induced the belief that there was never any intention of abolishing the estate by the curtesy when this Act was passed. But that point was not left in doubt, for by the fourth section of the Act no conveyance or act of a wife was to deprive her husband of any estate he might become entitled to as tenant by the curtesy. It must also be observed that there was in existence at the time an Act respecting the conveyance of real estate by married women (h), which required the joinder of the husband in conveyances by his wife.

(e) *R. C. Bank v. Mitchell*, 14 Gr. 412; *Chamberlain v. McDonald*, 14 Gr. 447.

(f) *Kraemer v. Gless*, 10 C. P. 475.

(g) *Emrick v. Sullivan*, 25 U. C. R. 105.

(h) C. S. U. C. cap 85

We have dwelt upon the provisions of this Act, now repealed except as to rights acquired and acts done thereunder, because the provisions of succeeding statutes are strikingly in contrast with them, and by a comparison we are able to arrive at the measure of the rights and liabilities of married women under each, which also determine to a great extent the rights of the husband.

In the first class, then, we may place all property acquired by married women either before or after the consolidated statute, and whether owned by them at the time of their marriage or acquired during coverture; and we extend the period of existence of this class to the date of the passage of the Married Women's Property Act of 1872—2nd March, 1872.

The Married Women's Property Act, 1872 (i), was essentially different in principle from the consolidated statute. It declared in the first section that "After the passing of this Act, the real estate of any married woman, which is owned by her at the time of her marriage, or acquired in any manner during her coverture, shall . . . be held and enjoyed by her for her separate use, free from any estate or claim of her husband during her lifetime or as tenant by the curtesy, etc." The construction of this section does not turn upon the express words relating to the estate by the curtesy but upon the extent and signification of the words "for her separate use." The key to the Act is found in a *dictum* of Sir Geo. Jessel's, in *Cooper v. Macdonald* (j). "A gift of a fee simple estate or a gift of a capital sum of money to the separate use of a married woman gives her the same power of alienation over it as if she were a single woman. She is entitled to dispose of it as if she were not a married woman at all, and that at once gets rid of any notion of the husband having an interest. Whatever interest he would have had in the absence of disposition is got rid of by the disposition." It was accordingly held, in *Furness v. Mitchell* (k), that every married

(i) 35 Vict. cap. 16.

(j) L. R. 7 Ch. D. at p. 293.

(k) 3 App. R. 510.

woman who acquired land under this Act held it for her separate use; and that she consequently had the absolute power of disposing of it as if she were unmarried. As against this there was the contention that the Act respecting conveyances by married women (*l*) required the joinder of the husband in every case of a conveyance by married woman of her land. But this Act and its successors were confined in their operation to those married women who as respects their property were within the Act of 1859. Otherwise, as Burton, J.A., points out, the effect would have been to render section one of the Act of 1872 nugatory.

So far as the wife was concerned during her lifetime, then, she had under this Act the *jus disponendi*, and could alienate her land at pleasure. What became of the land at her death, however, is what concerns us at present. Sir Geo. Jessel's explanation of this situation is very clear. His Lordship says, speaking of the conveyance to the separate use of a married woman, "It enabled her to make a pure and clear disposition of it, and in that way it was wholly independent of the husband. But that is no reason for carrying it a step beyond. The separate use, if I may say so, is exhausted when the wife has died without making a disposition. She enjoyed the income during her life, and she has not thought fit to exercise that which was an incident of her separate estate, the right of disposing of her property. Why should equity interfere further with the devolution of the estate? Why should it say, I prefer the eldest son to the husband, who had a right at law of succeeding during his life, so to speak, to the estate which had become vacant by the death of the wife? I can see no reason on principle; and therefore it appears to me, if you decide on principle only, you will come to this conclusion, that where a wife, either by deed *inter vivos* or by will, disposes of the fee simple settled to her separate use, that disposition takes effect free from any claim of the husband or the eldest son or other heir-at-law; but that

*l*) C. S. U. C. cap. 85, amended by 34 Vict. cap. 24.

where she dies without making any such disposition, the rights of the husband and rights of the heir are equally unaffected, and equity ought to follow the law" (m). This was the conclusion arrived at in *Furness v. Mitchell* (Patterson, J.A., dissenting).

The question naturally arose, on the passing of the Act, to what married women did it apply? to those who were married after it came into force, or to those who acquired property after it came into force though married before that time? And *Austin v. Dingman* (n) is usually cited for the proposition that it was not retrospective, that is, that it applied only to women married after it was passed. But it is clearly shown by Moss, C.J., in *Furness v. Mitchell* (o), that that point was not necessary for the decision of that case, because the marriage had taken place in 1851, and the husband had entered into possession in 1852. "His rights, therefore, had been preserved by the Act of 1859, and the only argument open to his opponent, who claimed under a lease made by the wife, was that the marital right to the possession during the joint lives was extinguished by the Act of 1872." It was accordingly held that all married women were affected by its provisions as to property acquired after it was passed. As to property acquired before it was passed, the vested rights of husbands would have been disturbed by a retrospective application.

In the second class, then, we may place all property acquired after the passing of the Act by women married at any time, and all property owned at the time of their marriage by women married after the Act, or acquired during their coverture; and we extend the period of existence of this class to the date of the coming into force of the Revised Statutes.

In 1877 an amendment was made to section one of the Act of 1872 (p), which was embodied in the Revised Statute, section four, and declared that nothing in the Act contained should prejudice the right of the husband as tenant by the

(m) L. R. 7 Ch. D. at p. 296.

(n) 33 U. C. R. 190.

(o) At p. 513.

(p) 40 Vict. cap. 7, sched. A. (156).

curtesy in any real estate of the wife which she had not disposed of *inter vivos* or by will. And by the same Act it was declared (q), repeating the enactment of 1872, that any married woman should be liable on any contract made by her respecting her real estate, as if she were a *feme sole*.

As to the *construction* of section four of the Revised Statute, that is determined by the decision in *Furness v. Mitchell*, fortified by the words added by the amendment of 1877. But as to its *application*, it is to be observed that a very important alteration of the law was made; for while the Act of 1872 applied to women married at any time, the Revised Statute restricts the operation of the clause in question to women married after 2nd March, 1872.

The Act groups married women into three classes: 1. Women married before 4th May, 1859. These may have, hold and enjoy real estate not on or before 4th May, 1859, taken possession of by their husbands. 2. Women married between 5th May, 1859, and 2nd March, 1872, both inclusive. These have rights similar to the first class. 3. Women married after 2nd March, 1872. These come within the decision in *Furness v. Mitchell*, and take their property as separate estate with the power to dispose of it at pleasure.

It is thus seen that the power to deal with land as separate estate which, under the Act of 1872, was accorded to any married woman who acquired property after it was passed, is by this Act restricted to women married after the 2nd March, 1872. This suggests a fourth class, namely, women married before the Act of 1872 who acquired property after the Act, and were still the owners thereof at the time when the Revised Statute came into force. There is no doubt that during the period between 1872 and 1877 all married women had (under the authority of *Furness v. Mitchell*) the right of acquiring, holding and disposing of property as if they were unmarried. Did then those women who were married before 1872, and who owned property at the time of the coming into force of the Revised Statute,

(q) Sec. 19.

which had been acquired after 1872, drop into the position of women who had acquired property under the Consolidated Statute? Did the right to dispose of that property which they undoubtedly had before the Revised Statute, cease upon the coming into force of that Act? Did their husbands, in other words, suddenly acquire estates by the curtesy initiate under the Revised Statute which their wives could not deprive them of? The affirmative was in effect decided in *Godfrey v. Harrison* (r). In that case a woman married in 1850 and acquired the land in question in July, 1872. In 1880 a bill was filed respecting the same lands, and it was held by the Referee in Chambers that it was not her separate estate, inasmuch as she had power to have, hold and enjoy it merely under the second section of the Revised Statute, and therefore that she should have sued by a next friend. This is not a satisfactory decision, however. It does not appear to have been argued that having acquired the land after the passing of the Act of 1872, she had a vested interest in the land of a very valuable character, namely, the right to dispose of it as a *feme sole*, and that she would be divested of it by such an application of the Revised Statute. In other words to apply the Revised Act to property held under the Act of 1872, would be to unsettle, in favour of the husband, property which had been previously settled to the wife's separate use. It is submitted that this was not the intention of the Legislature. The Revised Statutes, where they are not the same in effect as the Acts for which they are substituted are prospective only, and not retrospective in their operation; and all existing rights, titles and interests were expressly saved by the Act respecting the Revised Statutes (s). There should be no doubt that such a valuable right as that of a married woman with respect to her separate property, both as to the extent of her estate and her title to dispose of it, would be within these saving clauses; but even without such saving clauses, the Act should not have been construed as retrospective where the effect would be to disturb

(r) 8 P. R. 272.

(s) 40 Vict. cap. 6, secs. 9 and 10.



vested rights. It is therefore submitted that a woman married before the Act of 1872, who acquired land after the Act, and retained it until after the Revised Statute came into operation, would, notwithstanding that enactment, still hold it as separate estate; and consequently that the estate by the curtesy would arise only in the event of her dying without having disposed of it by instrument *inter vivos* or by will.

In the third class then we place all property so acquired and held. We also place in this class as being of the same character, all property acquired after the coming into force of the Revised Statute by women married after 2nd March 1872.

In the fourth class we may place land acquired after the coming into force of the Revised Statute by women married before 1872. In these cases the estate by the curtesy attaches at all events, and cannot be disposed of except by conveyance of the husband. This is the result of the third section of the Act which is a re-enactment of the Consolidated Statute, and gives to women married between 5th May, 1859, and 2nd March, 1872, both inclusive, the power to have, hold and enjoy their property, but not to dispose of it without the consent of their husbands—being the same enactment in effect as the Consolidated Statute though limited to a particular class.

The Married Women's Property Act, 1884, is next in order. It repeals the Revised Statute with which we have been dealing, but provides that the repeal shall not effect any act done or right acquired while the said Act was in force, or any right or liability of any husband or wife married before the commencement of the Act to sue or be sued under the provisions of the repealed Act, for or in respect of any debt, contract, wrong or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of the Act. There can be no reasonable doubt that the position of married women with respect to their property acquired



before this Act was passed remains unchanged; and at the same time the right of any husband acquired in respect of his wife's property before the passing of the Act remains unaltered and unaffected. The questions that concern us then are, first, as to the application of the Act, that is to whom and to what property does it apply? Secondly, what is its construction?

The second section declares that "a married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding and disposing by will or otherwise, of any real or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee." The first noticeable feature of this section is its generality. Its terms are broad enough to apply to all married women, and it in fact does apply to "any property." And it appears to have been so treated in *Re Coulter & Smith* (t). The married woman in that case, Mrs. Caines, was married before 1870, and was in that year deserted by her husband. In 1874 her grandfather made his will whereby he devised the land in question to his daughter for life with remainder to her children (one of whom was the married woman in question) in fee simple. He died shortly after making his will—we may presume before 1877, though the report does not mention the date. That being so, Mrs. Caines became entitled between 1872 and 1877 to a remainder in the land in question; and, assuming that such an interest is within the Act of 1872, she was entitled to enjoy it as her separate estate and dispose of it without her husband's consent. We assume too, that the Revised Statute did not affect her right. Adopting that view, no fault can be found with the decision that Mrs. Caines could convey alone.

The life-tenant died in 1880. And if we assume that the property was not Mrs. Caines' separate estate until it fell into possession, she would in that case take it under the Revised Statute; and as she was married between 1859

(t) 8 Ont. R. 536.

and 1872, she would take it subject to her husband's right as tenant by the curtesy. The question would then arise, whether the Act of 1884 enabled her to treat it as separate estate and dispose of it without her husband's consent. The argument was directed to the construction of the Act of 1884, and seems to indicate that the effect of that Act was the point in dispute. The learned Judge does not give the reasons for his judgment, and so it may well be attributed to an opinion that the vested right of Mrs. Caines existed under the Act of 1872 to dispose of the land as her separate estate. If however it was meant that the Act of 1884 was general in its application to all married women, whenever married, and to all property whenever acquired, we should hesitate to accept the decision as correct for reasons which we now venture to give.

The second section, in addition to what we have quoted, provides that a married woman shall be capable of rendering herself liable in respect of and to the extent of her separate estate, and of suing and being sued, as a *feme sole*; every contract made by a married woman shall be deemed to be made with respect to her separate property; every contract shall bind not only her separate property, but also all her after acquired property. Section three declares that "every woman who married *after* the commencement of this Act shall be entitled to have and to hold as her separate property, and to dispose of *in manner aforesaid* all real and personal property which shall belong to her at the time of her marriage, or shall be acquired by or devolve upon her after marriage, etc." Section five declares that "every woman married *before* the commencement of this Act shall be entitled to have and to hold and to dispose of *in manner aforesaid* as her separate property, all real and personal property, her title to which . . . shall accrue after the commencement of this Act, etc."

A glance at the second section will, we think, show that it was intended thereby to give a general definition of the rights, powers and liabilities of married women with respect to their property, "in accordance with the provisions of

this Act." Both the third and the fifth sections state with particularity what married women are within its scope ; and by using the words "in manner aforesaid," refer back to the second section for a general definition of their powers. When looking for a *construction* of the Act as to the powers of married women, we look at the second section ; when trying to ascertain its correct *application*, we look at sections three and five.

The latter two sections confine the operation of the Act, first, to all property of women married after its commencement, and secondly, to property acquired after its commencement by women married before it was passed. It is upon this construction not in any sense retrospective ; and this agrees with the provisions of the twenty-second section which repeals prior Acts, but saves rights acquired thereunder. If this be the true construction, *Re Coulter & Smith* must be supported on the ground that the property of the married woman was acquired under the Act of 1872 as separate estate, and so remained at the time of the decision. Though it was argued that the absence of the husband entitled the vendor to an order for execution of the conveyance without her husband's consent, the matter was not brought before the Court under the statute containing that provision, nor, we believe, did the judgment proceed upon that ground.

With respect to the construction of the Act of 1884, it cannot be doubted that the principle of *Furness v. Mitchell* is applicable to it ; and that, inasmuch as a married woman who acquires property thereunder acquires it as her separate estate, she has the right to dispose of it without her husband's consent, and so may deprive him of his estate by the curtesy.

But upon the death intestate of a married woman who acquired land under this Act, the nineteenth section is well calculated to raise the question whether the husband can take anything. That section declares that "for the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the

same jurisdiction as she would be if she were living. Inasmuch as the legal personal representative is mentioned, we should hesitate before hazarding the opinion that the intention was to cast upon him instead of the heir the land to which the married woman dies entitled. The expression "separate estate" might be restricted to separate personal property were it not that in the succeeding section express mention is made of "separate personal property" in dealing with its mode of distribution. If section nineteen refers to real as well as to personal estate, it seems reasonably clear that the husband can take no estate even upon the intestacy of his wife. For the personal representative must have the power to acquire, hold and dispose of, and sue and be sued respecting the property as if it were the property of a *feme sole*. In order to enjoy and exercise the full rights of the deceased married woman he must be entirely free from interference on the part of the husband, and this would not be his position if the husband had an estate for life in the land.

It may also be a nice question whether this nineteenth section does not retroact upon the separate estate of married women acquired before the Act of 1884, that is, whether it does not apply to property acquired under the Act of 1872, and to property acquired under the Revised Statute by women married after 1872. The effect of this would be to cause that land which a wife had power to dispose of without her husband's consent to descend free from his estate by the curtesy. It could hardly be contended that that deprived the husband of a vested right. It is true he had in the cases above mentioned a potential right to an estate, a possibility of succeeding to the property, which was liable to be defeated by his wife's act. But it would be no greater hardship for him to be deprived of it by Act of Parliament than by act of his wife.

In the fifth class, then, we place property acquired after the Act of 1884 by a woman married at any time, and property of a woman married after the Act whether owned by her at the time of her marriage or acquired during coverture; possibly also property acquired under the Act.

of 1872 and property acquired after the Revised Statute by women married after 1872. Such property is separate estate, and the husband may be deprived of his estate by the curtesy by conveyance or will; and even on an intestacy it is doubtful whether he can take any estate.

“Last scene of all”—*The Devolution of Estates Act, 1886*. With respect to all property of married women within the Consolidated Act of 1859, which is subject to curtesy, the husbands of those dying after this Act will still be entitled to their estate. For the third sub-section of the fourth section of the Act expressly saves the estate by the curtesy provided the husband elects within six months after his wife's death to take that interest instead of an interest under the Act.

With respect to property within the Act of 1884, we have seen that it is doubtful whether the husband becomes tenant by the curtesy upon the death intestate of his wife, on account of the succession of her personal representative to her separate estate with all the rights and liabilities of the married woman. But assuming that he does take as tenant by the curtesy under such circumstances, a question arises whether notwithstanding the *Devolution of Estates Act*, he may not still elect to take that interest instead of his share under the Act—a point to which we shortly referred at page 13 of this volume. It arises from the wording of the third sub-section of the fourth section: “Any husband who, *if this Act had not passed*, would be entitled to an interest as tenant by the curtesy in any real estate of his wife, may by deed . . . elect to take such interest in the real and personal property of his deceased wife as he would have taken if this Act had not passed, etc.” Assume now the following case: A woman married after the Act of 1884 acquires land in 1885 and dies intestate in 1887. Now *if the Devolution of Estates Act had not passed*, her husband would have been entitled to an estate by the curtesy (u). He therefore fulfils the condition of section four,

(u) We are proceeding now on the assumption that the legal personal representative would not exclude the husband under the 19th section of the Act of 1884.

subsection three of the latter Act, "Any husband who, *if this Act had not passed*, would be entitled, etc." And so he may elect to take his estate by the curtesy instead of his interest under *The Devolution of Estates Act*. As long as the state of the law as we have assumed it exists under the Act of 1884, so long must this possibility occur of a husband claiming his estate by the curtesy on the intestacy of his wife. The clause in question (sec. 4, sub-sec. 3) refers to the future, not to the past. If the expression "would have been entitled" had been used instead of "would be entitled," there would not be so much doubt. But it is very evident that the clause as it now reads is quite as applicable to the case of a woman who acquires property in 1887, subject to the *Married Women's Property Act, 1884*, and dies years afterwards, as it is to the case of a woman who acquired property in 1859 and died after the Act of 1886.

Thus we reach a most unsatisfactory conclusion, and we can only hope that the Commission on the revision of the Statutes will devise some amendments which will set the agitated question at rest forever.

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## EDITORIAL REVIEW.

**Assimilation of the Practice.**

The title of the Judicature Act is as follows :—"An **Act to consolidate the Superior Courts ; establish a uniform *system* of pleading and practice ; and make further provision for the due administration of justice.**"

The less said about pleading the better. If there is **any** system at all, which we are inclined to doubt, sober reflection warrants us in saying that there is no adjective **extant** which can be used to qualify it.

But under the present state of affairs, the more said about practice the better—especially that part which pertains to the bringing on of motions.

First as to the weekly Court. In the Chancery Division motions are properly returnable only on one day, Tuesday, though the Court sits on Wednesdays and sometimes on Thursdays. In the other Divisions motions are returnable twice a week—on Tuesdays and Fridays. In the Chancery Division Tuesday motions need not be set down. In the other Divisions they must be set down. In the Chancery Division Wednesday motions must be set down.

In the Chancery Division there is but one Chamber day. In the other Divisions there are two. In the Chancery Division appeals to a Judge in Chambers must be set down. In the other Divisions they must not. In the Queen's Bench and Common Pleas Divisions it is held that an appeal to Chambers may be brought on before any Judge of the High Court sitting in Chambers, without reference to the Division in which the action is pending : *Laidlaw v. Miller*, 11 P. R. 335. In the Chancery Division it is held that section 25 of the Judicature Act requires an appeal to be brought on in the same Division in which it is pending, and if it is set down in another Division the setting down is void : *Re Christie*, 7 C. L. T. Occ. N. 115.

Then as to the Divisional Court sittings. In the Chancery Division no distinction is made between jury and non-jury cases (except as to trials). If a judgment or verdict is to be moved against, a notice of motion must be given seven clear days before the sittings, and the motion must be set down seven clear days before the same date; and if a mistake made it is irreparable. In the other Divisions a two days notice of motion against a judgment is necessary; but an order nisi must be applied for in jury cases. And where the jury find certain facts and judgment is given by the Judge upon the findings, the judgment is moved against by notice of motion, but the findings are complained of by order nisi. And in the Common Law Divisions omissions to set down are not considered fatal.

In the Chancery Division the original judgment is delivered out to the solicitor and a copy kept. In the other Divisions the original judgment is kept and a copy, if desired, is delivered out.

It is needless to multiply instances. There are few who are fortunate enough not to have discovered to their cost that the practice is anything but uniform. This is one of the most striking sublunary instances of "descent with modification" that has ever presented itself. If any doubting evolutionist had it demonstrated to him that these various practices had a common ancestor—the Judicature Act—he could hardly then deny the possibility of a common progenitor producing both a bamboo stick and a mimicking caterpillar.

As we have before pointed out, these differences in practice are needless. Not only is there no necessity for them, but they are irritating to the profession who practice outside Toronto, and who are not as familiar with the practice as those who spend their days at the Hall. The origin of the variation is clear. It is simply an adherence by the Judges to those old rules of practice the differences in which it was thought were to some extent obliterated by the Judicature Act. We do not propose to institute a comparison between the two practices. There is much that is good in each. What is complained of is that two practices



have to followed. And it depends upon the merest accident as to which will govern—the chance of issuing a writ in one Division or the other.

There is no reason, indeed, why there should be separate Divisions. The same law is administered in all the Divisions. Equity cases are tried at the Assizes and Common Law cases at the sittings. And we have the Chancery Divisional Court hearing motions in jury cases.

Again, when the Chancery Divisional Court hears motions in jury cases, and deliberates upon whether the Judge at the trial misdirected the jury, or improperly nonsuited the plaintiff, and whether the damages were excessive, or the jury was irregularly impannelled, and so on, is it not rather an anomaly that they do not themselves sometimes charge a jury or nonsuit a plaintiff? If the principle is a correct one that a Bench of Judges who have never sat with a jury are competent to review the verdicts of juries, then let us have a Divisional Court sitting frequently, composed of Judges who do nothing else, and frequent sittings for the trials of actions by Judges who are set apart for that work only. If the principle is not a correct one, then let us have uniformity, complete uniformity, in all the Divisions.

This brings us again to the question of the sittings for trials. As the Chancery Division Judges try a good many non-jury common law cases, and the Judges of the other Divisions a good many equity cases, there is no longer any distinction between the cases based upon the Divisions in which they are pending. The only rational division of cases is into jury and non-jury cases. If this is borne in mind a very simple distribution of the work might be made. To borrow an idea from the County Courts—there might be four sittings a year for non-jury cases, and two for jury cases. The chances of a speedy trial would induce many to prefer a trial before a Judge alone to a trial by jury, and thus the number of jury cases would be diminished. If that change were assented to, it would then be possible to fix the dates for the non-jury sittings, and practitioners would always know long beforehand (as they do now in the County Courts), exactly on what day the trials would com-

mence. The judicial strength would in this way be spent to greater advantage than it is now, trials would be more speedy, and the profession and the public would be better satisfied than they are at present. As to the Bench, we do not doubt that the Judges would find it an advantageous change. They would go the circuits more frequently, but would on the whole have less to do at each sitting; and instead of their circuit allowances being diminished, as they probably would be by merely trying all cases at two sittings a year, they would be increased.

If we cannot have all these changes, at least let us have an assimilation of practice for the weekly Courts and Chambers.

The legislative Committees of the County Law Associations are now considering these and other matters, and it is to be hoped that some beneficial alterations will be made.

#### **Fraudulent Preferences.**

Two recent cases show how the construction of the Act respecting assignments for creditors may be approached from different points of view.

In *Building and Loan Association v. Palmer*, 12 Ont. R. 1, though the rule is not laid down in express terms, it seems to be implied that the proper way of determining whether there has been an offence against the Statute, is to examine first whether the transaction comes within the third section. If it does, there is no need for further enquiry. The third section declares that "nothing in the preceding section shall apply to any *bona fide* gift, conveyance, assignment, transfer or delivery over of any goods \* \* \* which is made in consideration of any present actual *bona fide* payment in money, or by way of security for any present actual *bona fide* advance of money, or which is made in consideration of any present actual *bona fide* sale or delivery of goods or other property, provided that the money paid or the goods or other property sold or delivered, bear a fair and reasonable relative value to the considera-

tion therefor." It is lawful therefore, for an insolvent (i) to sell goods for a present actual *bona fide* payment in money; (ii) to mortgage them for a present actual *bona fide* advance of money; (iii) to exchange them for goods or other property; provided in each case that the consideration is a fair one. Under any of these circumstances, it makes no difference under this case, whether the effect is to defeat or delay creditors. So we understand the judgment. In speaking of the second section and its effect, it is said, at p. 5, "It is not necessary that I should say how this would be, for I am of opinion that the third section applies to the case."

It is possible then for an insolvent to sell his whole stock in trade to a purchaser for its value in cash, and with the proceeds thus obtained to pay one creditor in full. Neither the creditor nor the purchaser may be in fault, yet the effect will be to defeat and delay creditors, and to give the one creditor a preference over the other. Yet the sale would be *bona fide* and the payment by the purchaser *bona fide*, in the sense of its being an adequate price.

What is the meaning of a *bona fide* payment under the third section? If the words "provided that the money paid \* \* \* bears a fair and reasonable relative value to the consideration therefor" had been omitted, it would have been open to argument that a *bona fide* payment meant simply an adequate consideration. But it is evident that it has a wider meaning as the section now reads. The payment must be *bona fide* and an adequate price for the goods. Does *bona fide* mean that the purchaser must see to the application of the purchase money? Though innocent in fact he may be guilty in law of having aided in defeating creditors; and it would not be at all an anomalous thing for a purchaser under such circumstances to be held to the duty of properly applying the purchase money. This would, it is true, put the insolvent in the situation of a trustee for the distribution of the money, and the statute certainly gives him as much of that character as it is possible to invest a man with who has lost the confidence of his *cestuis que trustent*.

If, however, the innocent purchaser is not to suffer, the preferred and innocent creditor may perhaps be called to account. The defeated creditors have two courses open to them—one, to follow the goods, the other, to follow the money. Perhaps they may join both creditor and purchaser and compel them to adjust their equities between themselves. In the case of the preferred creditor there is not the same objection to making him account as there is to compelling the purchaser to account. For, if the insolvent had acted with statutory honesty, he would have divided the purchase money rateably amongst his creditors; and to compel the preferred creditor to distribute the money, though innocent of any attempt to defeat others, is only to compel him to do what the statute intended should have been done in the first instance.

It therefore appears that though there may have been a *bona fide* sale and payment of purchase money, it may be necessary to go further, and to test the *bona fides* of the transaction by reference to the second section, and examine whether the effect may not be to defeat, or delay creditors, or to give a preference.

In *River Stave Co. v. Sill*, 12 Ont. R. 557, a somewhat different mode of interpretation was adopted. It was there said, at p. 567, "I think that in applying this Act we have only to ascertain whether the person who has made any gift, conveyance, assignment, etc., was at the time in insolvent circumstances or unable to pay his debts in full, or knew that he was on the eve of insolvency, and if so, what is the effect of such gift conveyance, assignment, etc., and if its effect is to defeat, delay, or prejudice his creditors, or to give any one or more of them a preference over his other creditors, or over any one or more of them, to declare such gift, conveyance, assignment, etc., as against them to be utterly void. \* \* \* I do not think that in construing the Act, where we find that the person who has made the gift, conveyance, assignment, etc., was at the time in insolvent circumstances or unable to pay his debts in full, or knew that he was on the eve of insolvency, we ought to be affected by any such consideration as that the gift, convey-

ance, assignment, etc., was made in good faith, or through pressure, or in ignorance of his circumstances, if he was actually in insolvent circumstances, or was actually unable to pay his debts in full, or as that the person to whom he made such gift, conveyance, assignment, etc., took it in good faith, or took it without knowing his circumstances; but we ought to look only at the effect it has had upon his other creditors, and deal with it accordingly."

The result of this case seems to be that the attacking party may make a *prima facie* case simply by proving the insolvency, the transfer, and its effect in delaying him. The party attacked must then bring himself within one of the exceptions in the third section. If the result is that a creditor has been preferred, then it would seem to follow logically that the transaction could not possibly come within one of the exceptions in the third section because that is one of the very evils aimed at by the second section. And if the *effect* is to prefer a creditor or to defeat him, the transaction is void, whether the purchaser had an evil intent or not.

#### **County of York Law Association.**

We call attention to the Report of the Association at another page.

We might state with reference to the re-election of the Board that it was their wish to retire in favour of a new Board, in recognition of the principle that the Association should become popular by the offices being held in rotation. But the desire of the members was expressed in the re-election of the Board with one exception.

The Association has been most successful, both in providing a useful library and in fostering a lively spirit amongst members of the Bar. More active interest has been aroused in the affairs of the profession by the creation of this body than has ever before existed, and we exhort every member of the Bar in the County who has not yet joined to become a member at once. The expense is ridiculously small, and the benefits are largely out of proportion to it.

Though a considerable sum has been expended in books, it is still necessary to lay out a large amount before the library can be called a good working library. Enquiries are made for books which the Association cannot as yet afford to buy, and the growth of the library must necessarily be slow unless an immediate increase is made to the funds by the accession of a number of new members.

### **Leave to Appeal.**

A mild rebuke was administered to a Divisional Court by the Court of Appeal in England for refusing leave to appeal in *Ex parte Gilchrist*, 17 Q. B. D. 521. The question for decision was whether a married woman who had become bankrupt could be compelled to exercise a power of appointment of which she was donee, by appointing two houses to her trustee in bankruptcy, that is, whether the right to exercise the power was "separate property." The Divisional Court held that she was compellable to execute a deed appointing the houses to the trustee: 17 Q. B. D. 167. Leave to appeal was refused by the Divisional Court, but granted by the Court of Appeal. As to this, Lord Esher, M.R., said, "The jurisdiction which the Judges of the Divisional Court have to give or to refuse leave to appeal from their own decisions is a very delicate one. Merely to say that they are satisfied their decision is right is not, I venture to suggest, a sufficient reason for refusing leave to appeal when the question involved is one of principle and they have decided it for the first time. If that was carried to its legitimate conclusion, they ought to refuse leave to appeal in every case."

### **Insurance Policy—Conflict of Laws.**

A case of some interest to those insured in British companies is *Lee v. Abdy*, 17 Q. B. D. 309. In that case the assured resided in Cape Colony, and was insured in an English life insurance company. He assigned the policy to

his wife, the plaintiff, who upon his death sued the trustees of the company. The defence was that the alleged assignment was by the law of Cape Colony void, by reason of the alleged assignee being the wife of the assignor. It was held that the law of Cape Colony applied to the assignment, and therefore that the defendants were entitled to judgment.

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## BOOK REVIEW.

*The principles of Equity*, intended for the use of students and the profession, by EDMUND H. T. SNELL, of the Middle Temple, Barrister-at-Law. Eighth edition. By ARCHIBALD BROWN, M.A., Edin. and Oxon., and B. C. L., Oxon., of the Middle Temple, Barrister-at-Law. London: Stevens & Haynes, 1887.

The seventh edition of this valuable book was published as recently as 1884, and the demand for it has produced another edition. The dissertation on practice has been omitted from this edition, which is a vast improvement, as so many works on practice are accessible to both students and practitioners. At any rate, it is doubtful whether it ever served a really useful purpose; for a student best learns his practice by actual practice in an office.

The learned editor has enlarged the scope of some portions of the work in consequence of expunging the principles of practice, so that the volume is not reduced in size. Snell's Equity keeps its place as a most reliable and useful book on the Principles of Equity.

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## THE COUNTY OF YORK LAW ASSOCIATION.

### **Annual Report for the year 1886.**

TO THE MEMBERS OF THE COUNTY OF YORK LAW ASSOCIATION.

Gentlemen—Under the terms of the Memorandum of Association, the Board of Trustees met on the Fourth of January, 1886, and elected Mr. B. B. Osler, Q.C., President of the Association; Mr. J. K. Kerr, Q.C., Vice-President; Mr. Walter Barwick, Treasurer; Mr. E. D. Armour, Curator; and Mr. Alexander Munro Grier, Secretary, and those members of the Board have performed the duties of their respective offices during the past year.

At a subsequent meeting of the board, by-laws were passed for the due regulation of the affairs of the Association, and these by-laws are now submitted for your approval pursuant to the provisions of the memorandum of Association.

The attempt to procure funds for the establishment of a library has been attended with very gratifying success. The sum of \$642 was donated to the Association by various members, and the sum of \$1,518 has been paid in upon account of stock subscriptions and annual fees. Application was made to the Law Society for an initiatory grant under the rules relating to County Libraries, but for the reasons set forth in a report to the Law Society which is printed in the *Upper Canada Law Journal* for 1886, at page 340, the grant from the Law Society was limited to \$1,500, and the committee decided to limit the annual grant to the Association for the present to a sum equal to the amount of the annual fees paid by members. Arrangements have been entered into for the purchase of books at advantageous rates, and several sets of reports have been secured at very low prices.

The library now comprises 1,128 volumes, and is now valued at over \$3,000.

The trustees have been fortunate in securing the services of a most efficient librarian, whose labours during the past year are deserving of great commendation.

In entering upon arrangements for the purchase of books for the library, the board decided to limit their selection of books to those in common use at *Nisi Prius*, and the making such a selection seemed in the first instance to be an easy task, but the legal business conducted at the Court House is so great that the trustees have experienced much difficulty in choosing books which are most commonly required by members of the Association.

During the progress of trials the application made by the Judges and counsel for books not in the library were found to be so frequent, that the librarian undertook the keeping of a list of books which were not in the library, and the books most frequently applied for have been purchased. It is still evident that the stock of books must be largely increased before the Association can be deemed to possess a fair *Nisi Prius* Library.

The librarian has for several months been engaged in correcting the text books by the addenda and corrigenda tables usually published in standard works, and in noting the reported cases followed, over-ruled and commented upon in later reported cases, and is about to establish an index to current legal periodicals. This is a plan which is pursued in the most elaborate manner in many of the principal Law Libraries of the United States, and if carefully followed in the Association Library will immensely increase its usefulness.

The work already done by the librarian in following this plan has brought about the constant use of the library for reference purposes, and so many demands are now made for books useful to members who devote their attention more particularly to solicitor's work, and which are not in the library, that the trustees find that their original scheme for the purchase of books must be considerably extended.

The trustees hope that successive boards will **continue** and improve upon those schemes for rendering the **library** more useful for reference purposes.

The daily attendance in the library evidences the **necessity** for its establishment.

The purpose, however, of the Association is not **only** the formation of a library, but also to promote the **general** interests of the profession, and to this end the Association might well bend its energies. The trustees suggest **that** an early endeavour be made to bring about a meeting **at** some central point, of delegates from the various **County** Law Associations in the Province, for the purpose of **discussing** matters of general interest to the profession.

They suggest also the appointment of a Committee **on** Legislation composed of members in active practice, whose suggestions would have weight with the Attorney-General of Ontario and with the Judges of the Supreme Court of Judicature in the consideration of required legislation and proposed amendments to the rules relating to practice.

The trustees further suggest the adoption of some method of gathering together and preserving materials and records relating to the history of the Bar of this county.

Some interesting portraits have been presented to the Association during the past year and others have been promised. The publication of a series of articles in the Magazine of Western History entitled "The Bench and Bar of Toronto," by Mr. D. B. Read, Q.C., a member of this Association, indicates the existence of much material which, if not preserved, will, in the course of a few years, be irretrievably lost.

The trustees suggest to the members the appointment of an historian to the Association.

The trustees have to record the death of one member of the Association during the past year, Mr. Davidson Black, a rising member of the Bar and one whose memory will last long with those who knew him intimately.

The trustees submit for the consideration of their successors in office the establishment of an insurance fund

based in principle upon the method lately established with success by the Toronto Board of Trade.

The trustees are indebted for many valuable suggestions made to them during the past year by his Honour Judge McDougall, who has taken constant interest in the purposes and welfare of the Association.

The Association now numbers 216 members. A list of those who became stock holders during the year 1886 is submitted herewith. A catalogue of the books and periodicals contained in the library and detailed statements of the assets and liabilities of the Association at the date of the report and of the receipts and disbursements on account of the Association during the year are submitted for your consideration.

The treasurer's accounts have been duly audited, and the report of the auditors will be submitted to you for your approval.

FINANCIAL STATEMENT.

No. 1.

Statement of Receipts and Expenditure for the year ending 31st December, 1886.

Dr.			Cr.		
FOL.	PARTICULARS.	AMOUNT.	FOL.	PARTICULARS.	AMOUNT.
23	Reports and Statutes	\$2262 55	1	Stock Subscriptions..	\$1085 00
29	Text Books .....	684 77	5	Annual Fees .....	433 00
33	Periodicals .....	99 50	15	Donations.....	641 00
37	Binding .....	53 91	21	The Law Society....	1500 00
41	Furniture .....	45 05	105	(Initiatory grant.)	
43	Expenses .....	486 07		Carswell & Co. ....	691 91
52	Dominion Bank.....	666 56			
	Cash on hand .....	53 50			
		\$4351 91			\$4351 91

## No. 2.

## Statement of Assets and Liabilities on 1st January, 1887.

ASSETS.		LIABILITIES.	
Reports and Statutes.....	\$2316 46	Stockholders.....	\$1085 00
Text Books.....	684 77	Carswell & Co.....	691 91
Periodicals.....	99 50	Profit and Loss Acct.. 1886.	2088 93
Furniture.....	45 05		
Cash on hand and in Bank	720 06		
	<u>\$3865 84</u>		<u>\$3865 84</u>

## No. 3.

## Profit and Loss Account, 1883.

DR.		CR.	
Expenses.....	\$ 486 07	Annual Fees.....	\$ 433 00
Balance .....	2088 93	Donations.....	642 00
		The Law Society.....	1500 00
	<u>\$2575 00</u>		<u>\$2575 00</u>
		Balance.....	\$2088 93

TORONTO, December 31, 1886.

WALTER BARWICK,  
*Treasurer.*

Moved by Mr. C. H. Ritchie, Q.C., seconded by Mr. G. F. Shepley, and resolved—That a Committee on Legislation be appointed by this Association for the ensuing year, whose duty it shall be to consider from time to time what changes in or amendments of the laws, rules of court or practice may in their opinion be desirable, and to submit their views therein in the proper quarters and to use their efforts to have same carried into effect, also to make such suggestions in regard to proposed legislation as they may deem advisable, and that such committee be composed of the following persons : John Hoskin, Q. C. ; Charles Moss, Q.C. ; Z. A. Lash, Q. C. ; J. H. Macdonald, Q. C. ; A. H. Marsh, E. Douglas Armour and D. E. Thomson.

Moved by Mr. Bigelow and carried unanimously, that Mr. D. B. Read, Q.C., be appointed Historian.

Moved by Mr. Moss, Q.C., seconded by Mr. E. D. Armour, that the Board take early measures to bring about a meeting of delegates from the various County Law Associations in the Province, for the purpose of discussing matters of general interest to the profession—Carried unanimously.

Moved by Mr. H. Cassels, seconded by Mr. N. W. Hoyles, that this Association desires to place on record its appreciation of the earnest and close attention which has been given by the retiring Board of Trustees to the management of the affairs of the Association, and to congratulate the trustees upon the great measure of success which has attended their efforts. The Association also desires to thank most warmly His Honour Judge McDougall for his valuable co-operation with the Board of Trustees in their endeavour to promote the welfare of the Association.

The following officers were elected: President, B. B. Osler, Q.C.; Vice-President, J. K. Kerr, Q.C.; Treasurer, Walter Barwick; Curator, E. D. Armour; Trustees, W. Lount, Q.C.; C. H. Ritchie, Q.C.; G. F. Shepley, G. T. Blackstock, A. H. Marsh; Secretary, A. M. Grier.

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REVIEW OF EXCHANGES.

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*American Law Review.*—*July-August, 1886.*

**The Security for Railroad Bonds,** by EDWARD L. ANDREWS. A review of the modes in which Railroad bonds and coupons are manœuvered, with suggestions for provisions in the covering mortgage to protect bondholders.

**Origin and Policy of Wills,** by JAMES SCHOULER. A review of the history of wills. The learned writer then details those cases in which the will of the state is paramount to the will of the individual, as where the individual is of unsound mind, where the formalities required by law have not been complied with, etc.

**The Treaty-making Power under the Constitution,** by SIMON GREENLEAF CROSWELL.

**Are Railroads subject to Assessments for Local Improvements,** by FRANK BREWSTER. The public character of railroads is no ground for their exemption, they being in fact primarily intended for the benefit of their stockholders. The form of the remedy, however, may form a ground for exemption. Where the remedy is real as well as personal, that is, where the tax forms a lien on the railway, it is said the railroad company is exempt; otherwise, where the remedy is personal also. In conclusion the learned writer says, "There seems, therefore, no doubt but that the true rule to be followed in construing a general law authorizing municipal assessments for local improvements, is to hold that railroads are liable to these assessments in the same manner as individuals, in all cases where the remedy is personal as well as real; and that they are not so liable when the remedy is only by the enforcement of a lien against the property assessed, except where such property is not necessary for the operation of their franchise."

**Our State Department and Extradition,** by GEORGE H. ADAMS. A review of the positions of Great Britain and the United States, with respect to extradition under the present treaty, and their late attitude with regard to an extension thereof.

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# THE CANADIAN LAW TIMES.

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APRIL, 1887.

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## THE LIABILITY OF AN OWNER UNDER THE MECHANICS' LIEN ACTS.

**I**T has been held in this Province as far back as *Johnstone v. Crew* (a) that independently of express contract therefor a builder has no lien on the house which he has built or repaired; and Chief Justice Robinson adds, that it would be most inconvenient he should have it as such a lien would exclude the owner from his own freehold. The Mechanics' Lien Act of 1873 thrust this inconvenience on the owner, and his liability and trouble have been largely increased by the succeeding Acts. Liens similar to those given by the Acts in question are, however, well known to the law, but the unique rights arising by legislative enactment in favour of mechanics and workmen have been held to be entirely dependent on Statute for their recognition and enforcement (b).

In *King v. Alford* (c) the Statutory Mechanic's Lien has been likened to the right of an execution creditor against the land of his debtor; and Mr. Justice Ferguson points out that a distinctive feature inseparable from a vendor's lien is not to be found in the creation of these Acts.

(a) 5 O. S. 200.

(b) *Crone v. Struthers*, 22 Gr. 247; *King v. Alford*, 9 O. R. 643; *Benton v. Wichwire*, 54 N. Y. 226.

(c) 9 O. R. 643.



The lien given by the Act of 1873 was a comparative simple one and existed only in favour of a direct contractor with the owner. The latter although subjected to the inconvenience which Chief Justice Robinson apprehended, could escape from it by performing his contract with the builder and paying the agreed price, while the builder's rights became somewhat analogous to those of a mortgagee, entitled to sell the land on which the building was erected and retain the amount due to him.

Even in cases where the rights of others intervened and complicated the statutory right, the remedy could be worked out by the machinery of a Court of Equity much in the same way as was adopted in *Jackson v. Bourman* (d).

There is no definition of an "owner" given in the Act of 1875 except that by section 1 it must be some one at whose instance or request or upon whose credit the work is done. The lien is limited to his estate or interest in the land. A somewhat wider signification is given to the term in the Act of 1874, which is adopted in the R. S. O. cap. 120. By the latter an "owner" is one "at whose request, and upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit" the work is done or material furnished, and he must also be a person "having any estate, legal or equitable in the lands" or some one claiming under him "whose rights are acquired after the work in respect of which the lien is claimed is commenced."

A judicial decision seems to have been needed to shew that the two parts of this definition must not be separated and that the having of an interest or estate in the lands is not sufficient. In addition the owner of the estate or interest must be one "at whose request and upon whose credit, etc.," the work has been done (e).

Mr. Justice Proudfoot says in that case that the American Courts construe the term "owner" as the correlative of "contractor" and as meaning the person who employs

(d) 14 Gr. 156. •

(e) *Bank of Montreal v. Haffner*, 29 Gr. 319, in appeal 10 A. R. 592.

the contractor and for whom the work is done. This is of course the evident intention of the statute.

This correlation is an important fact and gives the key to much of the Mechanics' Lien law. The two necessary qualifications in a lien holder, namely, the doing of the work and the doing of it on or in relation to land and the erections on it, will find their complement in the legal status of an owner under these Acts—a combination of a liability for the work and an interest in the land and the erections on it in reference to which that work is done. Broadly put, there must be between a contractor and an owner, as these terms are used in Mechanics' Lien legislation, first the relation which is comprehended in the term "contract," and second the relation indicated by the term "lien." The term "contract" includes liability resulting from his doing of the work on the one hand by a contractor under some express or implied agreement for the other party to that agreement, viz: the owner. The term "lien" expresses the interest or charge acquired by the doing of that work upon a particular piece of land or erection on it, which results in a benefit to a person owning an interest in that land or erection or an increase of that interest. Combine these two relations and it will not be necessary to demonstrate that the personal liability arising out of "contract" is limited so far as the land or erection goes to the interest in it of the person so liable, nor that the interest acquired under the "lien" is measured by the money liability of the owner of that interest.

This combination is valuable even where, as under the Act of 1873, the lien went no further than the direct contractor. It is doubly important when a Mechanics' Lien is handed on to every sub-contractor or material man. There can even now be no lien by a sub-contractor without those two essentials existing as between the original contractor and the owner, and it is the disregard of this consideration that has not only proved the ruin of so many claims by sub-contractors but has brought so much discredit on the Acts; the popular impression appearing

to be that the statutory Mechanic's Lien was dependent upon only one relation existing namely the ownership of an interest in land and the doing of work benefiting the owner of that interest, and did not need the proof of a personal liability of the owner of that interest.

This principle runs through all the Acts passed in this Province on this subject. In section 3 of R. S. O. cap. 120, where a lien is given by furnishing materials to be used and by virtue of so furnishing the lien is "limited in amount to such sum as is justly due to the person entitled to such lien." The statement required to be filed must state the name of the person for whom and *upon whose credit* the work is done. And section 6 in so many words limits the lien upon the estate and interest of the owner to the sum payable by the owner to the contractor.

It is equally distinct where the rights of sub-contractors come in. In section 6 where the lien is claimed by a sub-contractor the amount of his lien is limited to the amount due and payable to the contractor or sub-contractor.

By section 8 a charge is given in favour of sub-contractors "upon any amount payable by the owner." By section 11 payment made in good faith (except as provided by the Act 41 Vict. cap. 17) by the owner to the contractor operates to discharge the sub-contractor's lien *pro tanto*.

Bearing in mind this ruling spirit of the Acts, the two exceptions only serve to emphasize it. The owner of a reversion in fee simple after a lease where the lessee fulfils the statutory definition of owner is only made liable if he consents in writing. A married woman who only fills one of the relations above mentioned and who is not personally liable upon any contract becomes an owner within the meaning of these Acts where her husband is the person for whom the work is done, and when the claim is for wages.

The lien given by the Act of 1873 was eminently just where the liability and the ownership of property directly benefited went hand in hand. Alienation was prevented to the detriment of the workman, and realization of the claim was allowed out of what was the product of the

work. A charge upon the moneys payable was by that Act given to those who had worked for or supplied materials to the contractor but no lien upon the land, and in that quasi garnishee procedure we see the germ of the subsequent legislation in favour of sub-contractors.

The difficulties which could arise in the administration of that Act were few in number and appear to have been confined to cases where lien holders disputed with encumbrancers for priority, as in *Douglas v. Chamberlain* (f), and *Richards v. Chamberlain* (g), and where owners took advantage of the expiry of the time for the registration of a lien to contest its attaching, as in *Neill v. Carroll* (h). The first difficulty was the most serious, but it does not affect the question of the liability of an owner. A lien may be registered in two ways, by the filing of a statement of claim or by the registration of a certificate of *lis pendens*. The former is the most usual method employed, and the time is limited by R. S. O. cap. 120, sec. 4, in the following words:—"Before or during the progress of the work . . . or within thirty days from the completion thereof, or from the supplying or placing of the machinery."

This seems to allow a mechanic as soon as he enters into a contract and before he begins work or during its progress to register his lien. The thirty days run from the completion of the work in respect of which the lien arises, and the word completion must be construed in the way indicated by V. C. Blake in *Neill v. Carroll* (i) as meaning completion "according to the terms of the particular contract under which the claim is being made." The same case (j) is the leading authority for the proposition that the term "completion of the work," or "the supplying of machinery," is to be read as meaning a substantial completion of the contract, and that no colourable act done with the intention of extending the time for registration will avail to save the lien. Where, however, the work is done under a special contract which disentitles the contractor to receive his

(f) 25 Gr. 289.

(h) 28 Gr. 30.

(j) Affirmed in 28 Gr. 339.

(g) 25 Gr. 402.

(i) 28 Gr. at page 343.

reward until complete fulfilment of every part of the contract, it is probable that the thirty days would run only from the time when the last work, however trivial, was done, unless the owner by acquiescence were debarred from denying completion when the substantial part of the work was done.

By the Act of 1874 the mechanic's lien was extended downwards to include sub-contractors. The effect of this enactment does not appear to have been sufficiently considered. Bearing in mind the principle already insisted on it becomes no less important, and on each hand the difficulties increase enormously. The sub-contractor while usually able to prove the ownership of an interest in the lands is utterly unable to estimate the amount due by the owner to the contractor. In almost every case he knows nothing of the terms of the contract nor of the payments made under it. Both these points are vitally important to him, but the Act while throwing on him the necessity of proving them makes no provision enabling him to see the contract and ascertain its terms, nor for assisting him to find out what the owner owes (k). He may register his lien, he may enter suit, and during, or at the end of litigation, which must be expensive, he is able to find out for the first time how the accounts between the owner and contractor stand. The costs of this litigation he cannot cast on the owner, except where the latter is at fault, and in the majority of cases the contractor whose default in paying the sub-contractor has caused the trouble is not worth the costs. Such is the result of legislation which creates rights without going far enough to make them readily and speedily enforceable. To go further and give a sub-contractor the right to see and know what is essential would be a most serious interference with the right of the owner, but if the necessity for this legislation is conceded it is inconsistent to resist the adoption of the means to make it effective. If the argument from inconvenience were valid as against the mechanic's lien law it would have a short life. On the

(k) *Dixon v. Lafarge*, 1 E. D. Smith (N. Y.), 722; *Pendleburg v. Meade*, Ibid. 728; *Shaver v. Murdock*, 36 Cal. 293; *Mehrle v. Dunne*, 75 Ill. 239.

other hand the position of the owner is rendered doubly annoying. Whatever reason and justice there is in the Act of 1873, it is almost intolerable that the burden of these Acts should be rolled on the owner when he is paying fairly his contract price. His property may be covered up with liens by sub-contractors and material-men to whose contractor he has paid fully every dollar due him, and he has no method of freeing himself from trouble and expense and his property from liens without permitting all these lien holders to work out in the dark their full remedies, and to try against him all the ingenious methods of extracting more than he contracted to pay (*l*). It is not their fault and not his, but the fault of legislation, which compels both parties to solemnly contest with each other a matter of arithmetic that might be easily demonstrated if the often infinitesimal rights of the contractor did not intervene. The only ways of avoiding this are either to abolish liens by sub-contractors or give them and the owners the right at whatever violence to the right of contract to settle "the amount due," even if that allowed the sub-contractors to penetrate at once the mysteries of the original contract and the owner's ledger, and save the owner the right to settle the debts due not by him but by the defaulting contractor.

The limitation of the right of a lien holder who is a sub-contractor is found generally in section 6 of R. S. O. cap. 120 (*m*). The lien is "limited to the amount payable to the contractor or sub-contractor (as the case may be) by whom the work has been done or the materials or machinery have been furnished or placed." The general result of the latter's lien as given by the Act is that he has the right to garnish or attach his contractor's money in the owner's hands, and that the payment of the amount attached is guaranteed to him by his lien upon the owner's land. The position is not exactly analogous to that of an

(*l*) Except of course in the method allowed by R. S. O. cap. 120, subsecs. 23, 24, which is only available where a very clear case can be made out.

(*m*) See *Crone v. Stuthers*, 22 Gr. 248.

attaching creditor under the garnishee clauses, but roughly speaking the general reasoning applies. Many difficulties arise in the administration of this law—the chief of which is the determination of the amount due and payable.

There is nothing in the Acts to warrant a personal order against the owner in favour of a sub-contractor except by force of section 8 of R. S. O. cap. 120. When once the amount claimed is ascertained the machinery of these Acts is put in motion to realize the lien out of the land. The wording of section 6 which contains a proviso that the lien shall not attach on the owner's estate or interest "so as to make the same or the owner thereof liable to the payment of any greater sum than the sum payable by the owner to the contractor," must be construed with regard to the general scope of the legislation, and indeed the extract quoted may be reasonably construed as contemplating merely the natural result of the charge as forcing an owner to pay in order to save the estate. Section 12 provides that in default of payment a sale of the estate may be ordered, while section 13 provides for the realization of the lien by the ordinary procedure of the Court of Chancery. Section 8 is the only one which in any way contemplates the personal liability of the owner as a result of non-payment, and then only inferentially, for by giving a charge on the moneys in favour of a sub-contractor the Legislature no doubt meant that the charge on the moneys might be enforced in the usual way by suit against the owner. Of course it must be recollected that where the owner contracts directly with the contractor the Mechanics' Lien Acts only aid his claim on the owner upon the contract and do not in any way interfere with the personal remedy.

The amount due and payable should be settled entirely without regard to the claims of any one outside those who are parties to the contract, and it is only where the legislation requires it that this method can be disregarded (n). It was held under R. S. O. cap. 120, that the rights of a sub-contractor grow out of the rights of a contractor and are limited by the latter, and that it was a matter of inves-

(n) See *Hovenden v. Ellison*, 24 Gr. 448; *Rand v. Leeds*, 2 Phil. 160.



tigation by each sub-contractor before he contracted as to the extent to which his rights might be affected by the contract between the contractor and the owner (o). This decision which rendered the first line of section 3 of R. S. O. cap. 120 a dead letter, except as controlling the owner and his direct contractor, was right in principle and carried out fairly the avowed policy of the Act. It has now been met by special legislation (p), and the general principle it enunciated has been changed by prohibiting effect being given to any agreement whereby a person otherwise entitled to a lien would be deprived of it unless that person has signed the agreement in question. Now an owner to whom a builder may be indebted cannot ask him to work out his indebtedness on his land or building without rendering them liable to a lien by any sub-contractor or material man. In such a case before the amendment quoted his Honour Judge Macdougall held that such an arrangement might reasonably be read into the protection of section 3 R. S. O. cap. 120 (q). The change of the law has so far apparently not affected the wider question of set off or counter claim, though it may fairly be questioned whether a sub-contractor's lien is not thereby validated if he is entitled to succeed as against his contractor, though the contractor could not against the owner (see *Rand v. Leeds* ante), and in considering it for the present it will be convenient to omit any reference to the ten per cent. and wages clauses of the amending Act which qualify of course the succeeding deductions. In *Hovenden v. Ellison* (r), the form of decree provided for the taking of the account between the owner and contractor upon the footing of their contract, and then, only in the event of moneys being so found due by the owner, an account of the liens of sub-contractors. On further directions the owner's costs were deducted from the amount found due by him.

(o) *Forhan v. Lalonde*, 27 Gr. 600.

(p) 47 Vict. cap. 18, sec. 1, which alters the first line of R. S. O. cap. 120, sec. 3 from "unless there is an express agreement to the contrary," to "unless he signs an express agreement to the contrary."

(q) *Donovan v. Barnhard*, 10th D. C. York, 1882.

(r) 24 Gr. 448.



In *Briggs v. Lee* (s), the owners had paid the contractor all that was due to him up to the date when he abandoned the contract, and Spragge, C., held that section 8 which gave a charge in favour of a material man "upon any amount payable by (such) owner upon (such) lien," did not apply where there was at the time notice was given no money payable by the owner and therefore no fund chargeable. The learned Judge left open the question as to how far section 11 applied, it being proved before him that the whole balance of the contract price which was unearned by and unpaid to the contractor was expended in finishing the contract.

In *Petrie v. Hunter* (t), Boyd, C., held the plaintiffs, sub-contractors, entitled to a lien on the owner's lands for any balance due to the defaulting contractor up to the date of his dismissal having regard to the drawback then in the owner's hands. It does not appear in this case that the owner suggested any damages arising from the contractor's default; it is stated in the judgment that "the plaintiffs were to finish the work for the same price and on the same terms as they had agreed to do it" for the contractor. This would not of itself negative the existence of any claim for damages, for the contractor was to do the whole building, and the plaintiffs were only sub-contractors of the plastering and plumbing.

*Goddard v. Coulson* (u), appears to be the first case in which the amendment of R. S. O. cap. 120, sec. 11, by 47 Vict. cap. 17, sec. 1 is considered. The original section declared that "all payments made in good faith by the owner to the contractor . . . before notice in writing by the person claiming the lien has been given to such owner . . . of the claim of such person, shall operate as a discharge *pro tanto* of the lien created by this Act." The amendment makes the section read "All payments up to ninety per centum of the price to be paid for the work, machinery or materials as defined by section three of this

(s) 27 Gr. 464.

(t) 2 O. R. 233; affirmed in 10 A. R. 127.

(u) 10 O. R. 1.

Act, made in good faith, etc." In this case, as appears from the judgment of Hagarty, C. J. O., the contract price was about \$1,350, and the plaintiffs who were sub-contractors claimed ten per cent. thereof, or \$135. As a matter of fact the contract was not performed and therefore the \$1,350 was not earned, but from the report it is impossible to tell how much of it was actually earned. The Chief Justice finds that the contractor was paid in full for all work done up to the time of his abandoning the contract, and that it cost several hundred dollars in excess of the contract price to finish the buildings. The claim then was for ten per cent. of the contract price which was never earned, and not for ten per cent. of the work actually done, and Hagarty, C. J. O., declines to read the Act as amended as extending to charge the owner with ten per cent. "on a price for work which has never been done and which to the great injury of the owner his contractor wrongfully refused to do." Patterson, J. A., defines ten per cent. of the "price to be paid," which appears in the amending Act as meaning ten per cent. of "the money which becomes payable by the owner to the principal contractor." It does not seem to have been argued in this case that the lien holder might have a charge on ten per cent. on the amount actually earned, and the decision confines itself to laying down the rule that the ten per cent. is not to be calculated on the contract price irrespective of whether that price is earned or not. In *Re Cornish (v)* (in which the preceding case is not referred to, though decided almost a month before), Mr. Justice Proudfoot decided that the ten per cent. was to be calculated on the whole contract price. The work being done first by a contractor Martin, with whom the sub-contractors were in privity, and then by his surety, and on appeal he emphasizes his view that "the ten per cent. is to be ten per cent. of the price to be paid for the work, the entire work of building the house, nor is it (he says) of importance that the materials be furnished to one of the contractors only; the ten per cent. of the whole price is for the benefit of the material man."

The majority of the Divisional Court, however, decided **that** the ten per cent. was to be calculated on the amount **justly** due to the contractor with whom the sub-contractors **were** in privity when he made default. On this point, referring with approval to the principle enunciated in *Forhan v. Lalonde* (*w*), and *Crone v. Struthers* (*x*), Mr. Justice Ferguson expressly decides that the "price to be paid," means "not the contract price or lump sum to be paid for the whole work, but only the price to be paid for such work as the contractor performs under the contract." Mr. Justice Proudfoot's views, as expressed in his judgment **as** a member of the Divisional Court, must be considered with reference to the state of facts as they appeared to him, viz., that the contractor who finished the work after the original contractor failed, was "merely arranging for the finishing of the work which he was bound to see finished, and he undertook all the liabilities to which Martin (the original contractor) was subject." As however, he guards himself in his judgment on appeal from deciding what would be the effect of these acts in the event of an original contractor failing to complete his contract, and it being finished by an independent contractor, it may be that if he had taken the same view of the facts as the other members of the Court, he would not have differed from them in the result, though in the judgment appealed from the same learned Judge states that "the owner is not to be at liberty on failure of the original contractor to apply the ten per cent. he ought to have retained to the completion of the work."

The point left undetermined by the last case has been recently decided by Judge Macdougall in *Harrington v. Saunders* (*y*).

Unless overruled, it may be taken to be the law, at all events in the County of York, following as it does a case of *Maloney v. Holmes*, decided in 1886, in a considered

(*w*) 27 Gr. 600.

(*x*) 22 Gr. 248.

(*y*) 7 C. L. N. Occ. N, 88. This is the only case affected by 47 Vict. cap. 8, sec. 7, but its effect is not considered in the judgment (see ante).

judgment by his Honour, Judge Morgan, in the Division Court. In *Harrington v. Saunders* the principal contractor failed to complete his contract; the owner finished it at an outlay beyond the balance of the original contract price. The judgment holds that, provided the payments to the contractor have been (only) ninety per cent. or under of the value of the work actually performed, the sub-contractor's claim on the ten per cent., is postponed to the claim of the owner on the contractor for damages for their non-completion.

The result of these cases is eminently just, and is in fact only the inevitable consequence, a correct apprehension of the underlying principle of the Mechanics' Lien legislation before stated, viz., that the interest under the lien is measured by the money liability of the owner of that interest.

The application of 41 Vict. cap. 17, ss. 1 and 2, to secs. 8, 9 and 10 of R. S. O. cap. 120, appears to have been conceded, and has received judicial sanction in *Briggs v. Lee* (2). Grammatically it is hard to see how this construction is allowable. By the amending Act payments up to ninety per cent. are protected, if made *bona fide* and before notice in writing by the person "claiming the lien." In secs. 8, 9, and 10, the person claiming the lien is not active but passive. Persons furnishing material and doing work for the person claiming the lien are entitled to a charge on the moneys payable to the latter, and moneys payable to him may be withheld from him while proceedings are being taken and may be diverted to them, and such payment is deemed a satisfaction *pro tanto* of his lien. The notice contemplated by sec. 11, and the amendments, is to be given by the person claiming the lien, not by those who furnish him materials, etc., and payment made *bona fide* before such notice operates as "a discharge *pro tanto* of the lien *created* by the Act" (not the lien *claimed*). A person not claiming a lien, but notifying the owner under section 8, has a charge if the notice is given within thirty days, and by section 2 of 41 Vict. cap. 17, a person

(2) 27 Gr. 464.

claiming a lien is given a charge of ten per cent. for ten days without notice, and after if the notice is duly given. If the individual described in section 8, who does not claim a lien is meant in section 2, by the contrasted expression "person claiming the lien," why is it necessary to give him a charge, if notice be given within ten days, if he has it by giving notice within thirty days. It is tolerably clear that the amending Act refers to sub-contractors, who file or claim a lien, and who had previously no method of enforcing their lien except by suit and notice of their lien to the owner, and who therefore were not within the provisions of sections 8, 9 and 10. To them, the words of the amending section are applicable when it provides that the charge is given "in addition to all other rights or remedies given by the said Act," that expression referring to their right as lien holders to sell the land for their claim if a balance remained due to the contractor. If this construction is right, it results under the foregoing decisions in enhancing the right of those who proceed under sections 8, 9, and 10. They would, therefore, not be bound by payments made after their notice, but would have a charge on the moneys, and that charge might be prior, as an equitable assignment, to the owner's set off or counter-claim, which under the cases takes precedence of a lien; the latter being expressly limited by section 6 to the "amount payable to the contractor," etc.

The owner's liability is increased by the legislation respecting wages, as found in 45 Vict. cap. 5. The lien of the wage-earners is "not to prejudice any lien which any such person may have under the said Mechanics' Lien Act," and is given for wages not exceeding the wages for thirty days, or a balance equal to the wages for thirty days. It operates, notwithstanding any agreement between the owner and contractor for excluding a lien (a), and notwithstanding that the labour is in respect of a building, erection or mine, which belongs to the wife of the person at whose instance the work is done. If there is a contract for the work in respect of which the wages are earned, the

(a) By 47 Vict. cap. 18, sec. 1, this provision is rendered unnecessary.

lien has priority over all other liens and over any claim by the owner against the contractor, for or in consequence of the failure of the latter to complete his contract to the extent of ten per cent. of the price to be paid to the contractor. The latter clause will, no doubt, receive the construction given to similar words in the cases cited, and at all events one learned Judge has expressed himself loath to hold that the owner is liable to pay to the workmen money for which he never became indebted to the contractor (b).

This Act which is to be read as one Act with the Mechanics' Lien Act, and therefore applies so far as can be to all liens, permits the owner, if there is a contract for the work, to retain for thirty days after the completion of the contract, the ten per cent., unless the contract otherwise provides.

Further complications arising from the extension of the right of lien to sub-contractors, have occupied the attention of the Courts. Owners are compelled to embark in costly litigation, and to submit to have their property tied up for lengthened periods of time while the war goes on. *Lindop v. Martin* (c), *Bunting v. Bell* (d), *Re Moorehouse and Leak*, (e) and *Macpherson v. Gedge* (f), all illustrate different phases of the oppressive nature of the Act. *Re Moorehouse and Leak* touches what will probably be a moot point hereafter, viz., how far a material man or sub-contractor furnishing materials or doing work under one or more contracts on several houses, which are being erected under the same or different contracts with one owner, has a right under the wording of section 3, to a lien on all the houses. Whether his lien, if on all, must be divided before registration, if so, whether he must apportion his claim on each, and from when does the time for registration

(b) Per Patterson, J. A., in *Goddard v. Coulson*, 10 O. R. at p. 9.

(c) 3 C. L. T. 312.

(d) 23 Gr. 584.

(e) 7 C. L. T. Occ. N. 158.

(f) 4 O. R. 246.

run. With only the aid afforded by *Currier v. Freidrich* (g), this and other interesting questions must be left in the words of the learned Chancellor in *Re Cornish*, for some future plaintiff to ascertain by the assistance of the Courts (h).

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(g) 22 Gr. 243.

(h) In a former contribution it was stated that *In re Craig*, 3 C. L. T. 501, was singular in directing payment to the lien holders according to their priority and not *pro rata*. This is not correct, as the priority related not to registration but to the classes, viz.: liens for wages; liens of sub-contractors and material men, etc.

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## EDITORIAL REVIEW.

**The Devolution of Estates Act.**

An important decision on this Act will be found in the Occasional Notes of this number.

The dictum of the Chancellor in *Re Reddam*, ante, Occ. N. p. 19, that "The effect of the Act is to abolish the distinction between real and personal property for the purposes of administration, and to cast the whole estate upon the personal representative," certainly seems to indicate that the rights respecting the land of a deceased person, as distinguished from the rights of those claiming personalty, were completely obliterated. And so a devisee of mortgaged land claimed that Locke King's Act had been repealed, and that the debts generally, including the mortgage debt on his land, should be paid by the executor. It was held, however, that Locke King's Act was not repealed, and that the devisee took the mortgaged land subject to the mortgage.

The corollary to this proposition is, that a distinction between realty and personalty must still be observed by the executor, and that a devisee, and so by consequence perhaps, an heir, still takes title mediately through the personal representative from the testator or intestate.

**Mr. Justice Robertson.**

The vacancy in the Chancery Division which existed so long has been filled by the appointment of Thomas Robertson, Esq., Q.C. Mr. Justice Robertson has already shown great taste for work as well as appreciation of the principle of the Judicature Act by holding Court both in the Chancery Division and the Common Law Divisions.



**The Ontario Legal Chart.**

We have received from Mr. Hardy his Chart for this year, accompanied by a Dominion Law List. The Chart is improved by the addition of an alphabetical list of practising Barristers and Solicitors, with references to their addresses. It is by far the most convenient publication of the kind, and has already become a necessity.

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## BOOK REVIEWS.

*The Inter-State Commerce Act.* An analysis of its provisions, by JOHN R. DOS PASSOS, of the New York Bar. Author of "The Law of Stock Brokers and Stock Exchanges," etc. New York and London : G. L. Putnam's Sons. 1887.

This little book, of the series of "Questions of the Day," contains the Inter-State Commerce Act, with notes on its interpretation, and a short discussion of the origin of inter-state commerce legislation. The constitutionality of the Act will no doubt be the main point of contention, and the learned author puts two questions in effect: First, is the delegation of powers, which are really legislative, to a commission, lawful? Second, is the power to stop the working of a railroad in order to enforce compliance with the law a *regulation* of commerce, or an *interference* with or *destruction* of commerce? With respect to the first, the distinction is evident between giving power to a subordinate or created body to make a law, and the giving of power to such a body to bring the law already made into operation, or to relax its operation. The fact that the Commission may exercise powers which Congress might have exercised, provided it is not the enactment of a law, does not seem to be conclusive as to the invalidity of an Act.

As to the second question regulation necessarily includes prohibition, for the latter is only an extreme degree of the former.

The book is well printed, with an abundance of italics which perhaps show how strongly the learned writer feels on the subject.

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*A Treatise on the Statutes of Elizabeth against Fraudulent Conveyances*; the Bills of Sale Acts, 1878 and 1882; and the law of voluntary dispositions of property; with an

appendix containing the above Acts and some unpublished cases (1700-1733) from the Coxe and Melmoth MS. Reports. By the late H. W. MAY, B.A. Second edition. By S. W. WORTHINGTON, M.A., of Christ Church, Oxford, and the Inner Temple, Barrister-at-Law; Editor of the Fifth Edition of Griffith's "Married Women's Property Acts." London: Stevens & Haynes. 1887.

The present edition of this valuable work comes to us in much larger form than the first edition. The recent developments of the law respecting bills of sale has made the compilation of the decisions almost a necessity to any one not in the midst of the strife, and these are introduced. Many alterations and extensions of the original work have been made, particularly in the direction of the Married Women's Acts, but generally on the whole law. To such a great extent has this been done, that the learned Editor deserves credit as the originator of a great portion of the work. Some few references are made to Ontario and American cases.

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## CORRESPONDENCE.

**"Fusion of Law and Equity."**

*To the Editor of the CANADIAN LAW TIMES:--*SIR,—The Bar associations of this and other counties have passed strong resolutions bearing upon the importance of fusion of Law and Equity not only in name, but in reality, but another example of the "waste of Judicial force" has occurred here to-day shewing the necessity of immediate action, and the practical carrying out of the outspoken opinions of the profession here and elsewhere throughout the Province.

The learned Justice to whom were assigned the duties of taking the old fashioned hearing of the Chancery Division arrived here this morning in due course, made his bow to about six people in the Court Room, heard one of the two cases set down, was informed that the other case had been settled, and thereupon, after about three hours' session, closed the Court, which by the way will be opened again in a fortnight by another learned Justice from the Common Law Division, who will conduct what is known as an Assize, though the case heard to-day might quite as readily have been disposed of at such Assize.

Surely Sir, it is time this farce, repeated here every Spring and Autumn, be put a stop to, and the strength of the Bench concentrated and made more practically useful by doing away with two sessions of the Court (I use the expression advisedly as there is practically now one Court at Osgoode Hall, though it may be a Trinity of power), and arrangements made to dispose of the Civil and Criminal business of the Province (not by piece-meal as is now the case), but by two or three sittings equally distributed

throughout the year, and presided over by Judges of the Court irrespective of the peculiar nature of the business they may have been heretofore in the habit of disposing of.

This and this only is the way the business can be properly, expeditiously and economically dispatched, and is the way no doubt contemplated by the Judicature Act.

The hitherto tranquil state of our local bar has been somewhat disturbed by an agitation for the appointment of a junior Judge which we have always managed to do without, and the only necessity for which, it is urged, is the occasional absence of the County Court Judge upon protracted outside arbitrations; but these gentlemen forgetting again their resolutions that the practice should be more thoroughly fused, and ignoring the fact that there are two Masters in Chancery, have not thought fit to urge the extension of their powers to enable them to take the work of County Court Chambers (when the County Court Judge may be absent) rather than the appointment of some member of the profession who from the very nature of the emoluments attached to the office must necessarily be one not enjoying a large or remunerative practice, and could therefore hardly be looked upon (if he be appointed) as lending any great strength by his experience to the Bench of this County.

Yours, &c.,

REFORMER.

Hamilton, March 26th, 1887.

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## HAMILTON LAW ASSOCIATION.

A Special General Meeting of the Association was held yesterday at the Library to consider the proposed revision of the Rules relating to practice.

Mr. Irving, Q.C., the President, was in the Chair, and the following gentlemen were present:—Mr. Mackelcan, Q.C., Mr. Martin, Q.C., Mr. Lazier, Mr. H. A. Mackelcan, Mr. Culham, Mr. Bicknell, Mr. K. Martin, Mr. Bruce, Q.C., Mr. Waddell, Mr. Duff, Mr. Burton, Mr. Gausby, Mr. P. D. Crerar, Mr. Kittson.

The following Report of the Legislative Committee appointed by the Trustees was read:

“At the request of the Trustees the Legislative Committee have examined the draft of the proposed Revised Rules of practice to take effect with the Consolidated Statutes, and beg to report as follows:

As the proposed Rules were only received a few days ago and but one copy could be obtained from Mr. Langton it was impossible to examine them at all critically. Some suggestions, however, have been made which your Committee would recommend for consideration; they appear in the schedule to this Report. These refer to the Rules as framed.

In order that all the Rules of Practice may be completely considered, your Committee think it would be desirable to abolish all prior Acts and Rules in any way affecting practice or procedure and to declare that in all matters unprovided for the provisions of the Consolidated Rules shall, as nearly as may be, apply so that in any such matters an analogous practice may be created.

Your Committee also think that in any event the practice should be precisely the same in all Divisions.

Your Committee think that a sufficient time has now elapsed to test the working of the Judicature Act and that a favourable opportunity is now presented for effectuating the main object of that Act in abolishing all distinctions between the Courts. And they would recommend that steps be now taken to obtain a complete and perfect fusion of the three Divisions of the High Court of Justice so that all may not only possess the same jurisdiction but may exercise it in exactly the same way.

As the questions for consideration are of great importance, your Committee would suggest the desirability of having a convention of delegates from all the Law Associations of the Province, in order that the views of the Bar generally may be ascertained, as it might be desirable to delay the issue of that portion of the Statutes relating to the practice until next year if similar ideas are entertained throughout the Province."

On motion this report was adopted.

The resolutions of the County of York Law Association on the same subject were read, and on motion the following were adopted :

1. One Judge should sit in each week for the disposal of all business of the High Court required to be done in Court and in Chambers without regard to the Divisions in which the actions are pending.

2. A uniform practice should be adopted in all the Divisions of the High Court, including therein the practice at the sittings of the various Divisional Courts.

3. It would be expedient to have four sittings, held at permanent and fixed dates for the trial of non-jury cases, at two or more of which sittings jury cases should be tried, as may be determined by general orders of the Court.

5. An earnest effort should be made to secure a suitable increase of the Judges' salaries.

Messrs. Martin, Q.C., and Mackelcan, Q.C., and Teetzel were appointed delegates to represent the Hamilton Association at any meeting to be held in Toronto on the subject of the Revision of the Rules.

A letter was read from the Vice-President, Mr. Justice Robertson, resigning his position on account of his appointment to the Bench, and the following resolution was carried:—

“That the Association take this opportunity of congratulating Mr. Thomas Robertson, Q.C., on his appointment to the Bench and expressing their appreciation of his uniform kindness and courtesy as Vice-President of the Association and the hope that he may long be spared to adorn the high and honourable position to which he has been promoted.”

And Mr. Justice Robertson was also requested to dine with the Association.

In view of the important changes which are now taking place in connection with the revision of the Practice a hope was expressed that members of the Bar throughout the Province would join in the movement and give it as much strength as possible. The Toronto, London and Hamilton Associations are taking active steps in the matter, but the hearty co-operation of the Bar throughout the Province is very desirable.

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## REVIEW OF EXCHANGES.

*American Law Review.*—June, 1886.

**The Competency, as Witnesses, of Husband and Wife**, by STEWART RAPALJE, concluded in the following number. The common law rule is stated as being founded partly on identity of interest, and partly on a principle of public policy lying at the basis of civil society, which was intended to guard the security and confidence of private life, and prevent discord in families, even at the risk of an occasional failure of justice. Many enabling Acts have rendered husband and wife competent and compellable witnesses when the objection lay for identity of interest only; but the rule of public policy still obtains in some civil cases and in criminal cases. Very many English and American cases are cited, and many minute distinctions are pointed out.

**The Effect of a Recent Decision on the Law of Marine Insurance**, by MORTON P. HENRY. "In *Phoenix Ins. Co. v. Erie & W. Trans. Co.*, 117 U. S. 213, it was held (Bradley, J., dissenting), that (1) a carrier can lawfully contract with the shipper by his bill of lading, in case of liability to have the full benefit of any insurance that may have been effected upon or on account of said goods. (2) The insurer paying the loss is deprived of the right to sue the carrier by whose negligence the cargo was lost."

*Ibid.*—August, 1886.

**Fellow Servants**, by EDGAR G. MILLER, JR. The purpose of this article is to enquire what is the meaning of the term fellow-servant within the rule that a master is not liable to his servant for an injury caused by the negligence of a fellow servant. Many American cases are cited, the effect of which, however, is considerably altered by the Employer's Liability Act.

*Ibid.*—September, 1886.

**Income Bonds and Mortgages**, by GEO. FIELD. Corporate income bonds are drawn payable out of the net income of the Corporation. The income bondholders have a specific lien on the net income of the Corporation, and the income is specifically pledged to their use for the purposes of the bonds. The bonds operate as an equitable assignment of the income, consequently the income cannot be diverted from the

use of the bondholders. If it is so diverted, the bondholders may follow the funds and claim a lien on any property into which they may have been converted, except where it is in the hands of a *bona fide* purchaser for value. Many American and some English cases are cited.

*Ibid.*—October, 1886.

**Negligence in Imminent Peril**, by WILLIAM COLEBROOK. "The well settled rule of contributory negligence that a person cannot recover, if it appear that by the want of ordinary care and prudence on his part he contributed to the injury, or if, by the exercise of ordinary care he might have prevented the injury, is subject to recognised limitations. One of such limitations is that if the plaintiff without fault, is placed, by want of care of the defendant, in such a position that, at the moment, and in the face of great and threatening peril, he is obliged to choose between two hazards, and he makes such choice as a person of ordinary prudence and care placed in the same situation might make, and is thereby injured, the fact that if he had chosen the other hazard he would have escaped injury, will not relieve the defendant from liability for his own neglect." This rule is discussed and illustrated by the citation of numerous cases, under the following heads: Collisions of vessels—the rule in Admiralty; collisions of railroad trains; the rule as to employees; collisions at railroad crossings; jumping off a moving train at stations; the rule applied to stage-coaches and other vehicles; as to occurrences on streets; limitation of rule, when avoided.

*Ibid.*—November, 1886.

**The Constitutional Objections to Retrospective and Ex post Facto Laws**, by H. CAMPBELL BLACK. The subject considered from the American constitutional point of view.

*Ibid.*—December, 1886.

**The Principle of Stare Decisis**, by H. CAMPBELL BLACK. If a decision has been expressly overruled, either by the same Court which rendered it, or by a Court exercising appellate jurisdiction, it can of course no longer be cited as a precedent. But the two cases must necessarily be shown to be inconsistent rulings upon a state of facts substantially identical. An exception, however, would probably be made in the case of a single decision, probably erroneous, which should overrule a series of previous authorities, or unsettled the established principles of commercial or statutory law. Where a decision is manifestly erroneous and no injurious results would be likely to flow from a reversal of it, it is imperative that it should be reversed. But from this rule is to be excepted the case of a settled and established rule of property founded upon a series of erroneous decisions. An isolated decision is not regarded as conclusive as a precedent in the same degree that a series of decisions upon the point would be. *Obiter dicta* are not precedents. But though a point may not have been fully argued, yet the decision of the Court upon it cannot be considered *obiter dictum* when the question was directly in-

involved in the issues of law raised, and the mind of the Court was directly drawn to and distinctly expressed upon the subject. The language of a decision is not to be construed as a statement of abstract propositions without limitation, but in connection with the particular facts of the case, and the specific matters had in view when the language was used ; and when applied to an essentially different state of facts is to be understood as subject by implication to many limitations and restrictions. When a case has been decided in an appellate Court and afterwards comes there again, only such questions will be noticed as were not determined in the previous decision ; the points of law already adjudicated become the law of the case. But if the facts change on a second trial, the whole case may be open again.

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# THE CANADIAN LAW TIMES.

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MAY, 1887.

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## THE POWERS AND RESPONSIBILITIES OF RETURNING OFFICERS AT PARLIAMENTARY ELECTIONS.

BY the common law of England the sheriffs were returning officers for county elections; and to them the writs of election were invariably directed (*a*). All local and other elections were held in the sheriff's County Court (*b*). The sheriff was also returning officer for all cities or boroughs within his county; and he issued a precept to the proper corporate officer of such city or borough to hold the election; and when such election was concluded the officer returned the names of those elected to the sheriff, who thereupon made his return of all the members to the clerk of the Crown in Chancery (*c*).

And by the same common law the corporate officers named as returning officers in the charter of the borough, or the chief officer without any express nomination, were *ex officio* returning officers for borough elections (*d*); and the designation of such officer depended upon the terms of the charter, or on prescriptive right (*e*).

(*a*) Chambers' Dictionary of Elections, 580. But this practice did not apply to the counties palatine.

(*b*) Cooke on Elections, 21.

(*c*) This practice was altered in 1882 and 1885, except as to places not municipal boroughs.

(*d*) Heywood on Borough Elections, 60.

(*e*) Cooke on Elections, 21. By the Act 6 V. c. 18 (Imp.), a returning officer is declared to be "every person to whom by virtue of his office, under any law, custom, or statute, the execution of any writ doth or shall belong for the election of a member to serve in Parliament, by whatever name or title such person may be called."

By the common law of Parliament all elections of members in cities or boroughs depended on the legality of the election of the corporate officer; but elections held under officers *de facto*, though not *de jure*, were uniformly supported (*f*).

Thus a return made by a mayor who was afterwards adjudged an intruder, was held good (*g*); and by a mayor who had not taken the oaths prescribed by law to be taken before acting as such mayor (*h*). But this latter decision was afterwards reversed by the House, on objection taken (*i*). Similarly a return by a returning officer who was a minor was upheld by an election committee; though the House afterwards disagreed with the report, but on what ground does not appear, as there were other objections to the return (*j*). Where two sets of sub-bailiffs held separate elections and each returned different candidates, the committee decided that the election held by the sub-bailiffs who were such at the date of the delivery of the sheriff's precept, was good; and not the election held by the sub-bailiffs appointed after the delivery of the precept, and before the date of the return (*k*).

Notwithstanding some conflicting decisions, the House generally showed great tenderness in dealing with such returns; and the Journals contain many instances of mayors acting as returning officers after judgment of ouster (*l*). In nearly every case the validity of the elections has been upheld; but the persons improperly acting as returning officers have been censured (*m*).

The law exacts of every person who is placed in the situation of returning officer that his conduct shall be upright, impartial and consistent; and that he shall in all respects act therein to the best of his skill, knowledge and

(*f*) Chambers' Dictionary of Elections, 581.

(*g*) *Winchelsea*, 1 Com. Jour. 740.

(*h*) *Ibid.* 8 Com. Jour. 673, 674.

(*i*) *Portsmouth*, 3rd Feb., 1710.

(*j*) *Clitheroe*, 11 Com. Jour. 77.

(*k*) *Milborne Port*, 1 Doug. El. Cas. 97.

(*l*) *Rex v. Davie*, Doug. 568.

(*m*) *Roe on Elections*, 1, 446.

capacity. Returning officers are part of the executive department of the Government; and the office is a trust of the highest importance to the parliamentary constitution of the country. The impartial execution of its duties is, therefore, indispensably necessary to the preservation of the rights and franchises of the electors, and of the authority and privileges of Parliament.

A fit person to execute an office of trust is he who, as Lord Coke says, "is apt and fit to execute its duties, and who has three qualifications: honesty, knowledge, and ability; honesty, to execute it truly, without malice, affection or partiality; knowledge, to know what he ought duly to do; and ability, as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it" (n).

The House of Commons has ever been scrupulous in exercising its powers of reprehension and punishment over returning officers who have attempted to defeat or set aside the votes of the people. Every deviation by a returning officer from his strict line of duty,—such as lending himself to the views of particular candidates or their adherents, or making the colour or authority of his office subservient to political or private ends or purposes, or attempting to falsify or delay the return of members, or to negative the vote of the majority, or the results of the election,—has ever received the strictest examination, and the severest punishment from the House of Commons. And both the common and statute law supplement this parliamentary jurisdiction by the imposition of pecuniary penalties and imprisonment (o).

By the common law the sheriff or returning officer had no authority to interrogate voters, or to examine witnesses as

(n) 1 Stephens on the Law of Elections, 26.

(o) By 11 Henry IV. c. 1, and 8 Henry VI. c. 7, if any sheriff should make a return contrary to the former statute of 7 Henry IV. c. 15, he should forfeit £100 to the King, and have one year's imprisonment without bail. And the sheriff might be sued for perjury for such false return. And by 23 Henry VI. c. 15, a sheriff who made any return contrary to any of the statutes, should forfeit another £100 to the person duly chosen, but not duly returned: Dalton on Sheriffs, 332.

to their qualifications; nor could his decisions affect their rights. His duty was ministerial (*p*). But when the Act 8 Henry VI, c. 7, prescribed a franchise qualification, and gave the sheriff power to examine the voters on oath, "he was made a judge of the ability of the choosers of the knights for Parliament" (*q*).

Under this and subsequent statutes it was the practice of the returning officer to hold a scrutiny of the votes at the poll, and for this purpose he sat apart in a booth where objections were heard before him as to the qualification of voters (*r*).

And it is therefore now well settled that a returning officer is both a ministerial and a judicial officer (*s*).

Although recent statutes have prohibited his entering upon a scrutiny of votes at the election (*t*), and have otherwise varied the judicial duties of returning officers, others have been cast upon him which require the exercise of judicial discretion. But where the law has prescribed a definite course of procedure in respect of the details of an election, there can be no doubt that in respect of such matters his functions are ministerial.

The line of division between duties which are merely ministerial, and duties which are quasi-judicial, and which call for the exercise of a reasonable degree of official judgment and discretion, is not in all cases clear and definite. Questions affecting the sufficiency or regularity of the papers received from the deputy returning officers, and purporting to be election returns, involve duties of a quasi-judicial nature (*u*). But, beyond the determination of these and similar preliminary questions, the remaining duties of the returning officer, in counting the votes and deciding who has the majority, is merely ministerial or mechanical, involving simply the labour of adding together the number of

(*p*) Heywood on County Elections, 310.

(*q*) Dalton on Sheriffs, 333.

(*r*) Chambers' Dictionary of Elections, 615.

(*s*) Heywood on Elections, 309, 315.

(*t*) R. S. O. c. 10, s. 112.

(*u*) Bothwell, 8 S. C. R. 676.

votes given for each candidate, from the statements returned by the deputy returning officers, and declaring elected the candidate whom he finds has received the majority of votes given at the election (v).

In the *South Renfrew case* (w) Wilson, J., said: "I am of opinion that the returning officer is both a ministerial and a judicial officer. He has not now, as formerly, to hold an inquisition into the capacity or qualification of a candidate or voter; but I feel assured if a person appeared and was nominated, and such candidate were a woman or a mere child, that the returning officer could decline to receive such a nomination; and in like manner he could decline to receive the nomination of a Chief Justice or the Speaker of the Senate. I think also he may refuse a nomination paper signed by less than twenty-five electors, because the Act requires that the nomination shall be by twenty-five. I think too that he can reject a paper signed by twenty-five, if it were declared by the candidate that the paper was a sham; that the names were those of persons who were not electors at all, and never had been; or that half the names were forgeries."

The learned Judge further stated that the policy of the law was to give the people a full voice in the election of their own representatives; and that any defects or irregularities which did not affect the result of the election, should not be given effect to.

But while the law as to the limitation of the returning officer's jurisdiction over candidates and voters is correctly stated, the illustrations given by the learned Judge of the right of the returning officer to reject the nomination of certain persons, are not fully borne out by the recognized Parliamentary cases. The general result of these cases will be found to be that where the disqualification is *patent*, then the returning officer may possibly reject the nomination of

(r) R. S. Can. c. 8, s. 60. An action will lie against a returning officer or deputy returning officer for a breach of duty which is purely ministerial, and in such case it is not necessary to allege malice: *Pickering v. James*, L. R. 8 C. P. 489.

(w) *Hodgins El. Cas.*, 705.



the candidate ; but where the disqualification is *latent*, and requires to be proved by evidence, then as the returning officer has no common law or statutory jurisdiction to hear evidence of the alleged disqualification, or to judicially determine questions of law or fact affecting such disqualification, he would not be justified in rejecting the nomination of the candidate (x) ; except in the case of a member of one of the Provincial Legislatures (y).

The recent case of *Reg. v. Mayor of Bangor* (z) rather conflicts with the judgment of Mr. Justice Wilson ; and although arising under the Municipal Law, it is more in harmony with the decisions of the House of Commons since 1620. In that case, the returning officer returned as elected the minority candidate, on the ground of the supposed disqualification of the candidate who had received a majority of votes. Lord Esher, M.R., in giving judgment, states broadly that the returning officer is not entitled to inquire "whether the candidate is under any personal disability to be elected, whether the candidate be man or woman, or whether the person nominated be dead or alive (a). The returning officer has simply to perform the

(x) "Persons attainted of treason or felony, being chosen to be knights, citizens, or burgesses of the Parliament, it seemeth the sheriff ought to return them. Neither ought any man that is in execution for debt be chosen a knight or burgess for the Parliament, yet such persons being chosen it seemeth the sheriff ought to return their names : " Dalton on Sheriffs, 332. After a candidate has refused to take the oath of qualification, such refusal may probably operate as a sufficient notice to the electors of his disqualification, and consequently the votes given for him may be thrown away. But the sheriff according to the cases cited could not without danger to himself reject the votes of those electors who choose to poll for him, nor refuse to return him in case he has the majority : Heywood on Elections, 368.

(y) R. S. Can. c. 13. The power given to a returning officer to set aside the vote of the majority of the electors, and to return the minority candidate under this Act, is an exceptional and dangerous invasion of the rights of electors. It conflicts with the expressed law of Parliament, and the decisions of the Courts and election committees. No mode of trial or procedure as to notice to candidates or electors is prescribed ; and no power is given to the returning officer to administer oaths, examine witnesses, or to hear arguments.

(z) 18 Q. B. D. 349.

(a) When one of the candidates died on the morning of polling day, but his death was not known to the electors at the time of the polling, and on counting the votes it appeared that the majority had been given for the deceased candidate, the Court refused to declare the minority candidate elected : *State v. Walsh*, 7 Mo. App. 142.

arithmetical duty of adding up the votes, and to declare the person elected who has the majority. Though it is not necessary to decide the point, I am inclined to think that his declaration is merely ministerial, and that if he remained silent and did not make any declaration, the person who had the majority would be duly elected." He also held that the returning officer had no right to say *whether* votes were obtained improperly, or were given for an improper candidate; and that his return of the minority candidate was *ultra vires* and void (b). Lord Justice Lindley concurred.

Lord Justice Lopes was, if possible, more emphatic, and stated that the returning officer had no power to inquire as to whom the majority of legal votes had been given; that directly he had ascertained, by counting, to whom the majority of votes had been given, his simple duty was clearly and indisputably to declare that person elected; adding: "It cannot be that he has any power to declare with respect to the eligibility or ineligibility of any candidate. That would be a highly dangerous power to entrust to a returning officer" (c).

The House of Commons has, from its earliest days, been consistently jealous of entrusting returning officers with the power of judging of the ability or disability of candidates; and in this respect it has held that the returning officers

(b) The United States Courts have held that the fact of the election officers having given a certificate of election to the minority candidate will not prevent the granting of a *mandamus* requiring them to certify the election of the majority candidate: *People v. Hilliard*, 29 Ill. 419; *People v. Coover*, 50 Ill. 100. And it is not a valid objection to the jurisdiction of a State Court, on an application for the writ, that the office is a federal office, such as Member of Congress, and that the House of Representatives has jurisdiction to determine the right to the office. Nor is it an objection that the applicant does not show that he is qualified for the office, the question of eligibility being left for the determination of the House: *State v. Board of Canvassers*, 17 Fla. 9.

(c) The object of an election is to ascertain the views of the majority of the electors, or as the old Parliamentary returns had it, "the assent and will of the men of the whole county;" and Lord Mansfield, C.J., in *Rez v. Monday*, Cowp. 538, has shown how that object can be worked out: "Upon the election of a member of Parliament, where the electors must proceed to an election, there must be a candidate or candidates; and in that case there is no way of defeating the election of one of the candidates proposed, but by voting for another."

act merely ministerially in computing the number of voices, and in returning the persons, whether disqualified or not, who have received the majority of votes (*d*). And although the decisions of the House and its Committees have not always been consistent on other questions affecting elections, they show a uniformity of decision on this point, which harmonizes with the rule laid down in *Reg. v. Bangor*.

The first case of a return of a minority candidate by a returning officer occurred in 1620, at the *Leicestershire Election* (*e*). The Act 8th Henry VI. c. 7, required that the members to be elected for counties should be "dwelling and resident within the same counties" (*demurantz et reseantz deins mesmes les countes*). At the election a resident and a non-resident were nominated; but the non-resident obtained the majority of votes. The sheriff, however, returned the minority candidate, on the ground that he was advised by counsel that the majority candidate was not eligible. The House promptly sent for the sheriff and under-sheriff, "as delinquents," and caused them to kneel at the Bar and make their confession. Mr. Speaker then reprimanded them as great offenders to the House and the State; that being officers sworn to do justly in the return of members to the House, they had refused to return the member elected by the majority of voices, and returned another. The under-sheriff was pardoned, but the sheriff was kept in custody until he made a proper return and paid certain fees.

During the debate, Mr. Holt, a member, said that the sheriff was a judge of the number of voices, but not of the ability or disability of the candidates. Sir Edward Coke appears to have held similar views; and the House unanimously concurred.

(*d*) Heywood on County Elections, 355. An argument against this proposition will be found in Cor. & Dan. 12, n. The rule of Parliamentary law was thus stated in 1624: "All favour is to be afforded in allowing voices to as many freeholders as reasonably may be had for the choice of those by whose voices in Parliament they and their heirs are to be bound for ever." Glanville El. Cas. 102.

(*e*) 1 Com. Jour. 511, 573, 575, 516, 517, 518

In the *Corentry Case*, 1628 (*f*), another sheriff returned the minority candidate on the same ground—that the majority candidate was a non-resident. Sir Edward Coke stated in the debate that although the statute requiring residents to be elected was in the negative form, yet if the people elected a non-resident the election was good (*g*).

In the *Liverpool Case* (*h*), the returning officer took upon himself to decide that a coroner was ineligible for election, and returned the minority candidate as duly elected. For so doing he was declared to have “violated the rights of the Commons of England, and broken the privileges of the House”; and was committed to custody, where he remained until the dissolution of Parliament.

But the mild punishment of being kept in the custody of the sergeant-at-arms, had not the effect of checking the partizanship of unscrupulous returning officers; for in the *Denbigh Case* (*i*) another returning officer took upon himself to return a member “contrary to the majority of votes received at the poll.” The House thereupon took severe and decisive action, and declared that the officer had acted partially, arbitrarily and illegally, in defiance of the laws, in manifest violation of the rights of the freeholders of the county, and in breach of the privileges of the House. He was then committed to the gaol of Newgate, “the common receptacle of malefactors” (*j*); and an address was presented to the Crown praying that he might be removed from an office he held under the Crown (*k*).

(*f*) 1 Com. Jour. 880.

(*g*) The provision in 8 Henry VI. c. 7, as to residence, was repealed by 14 Geo. III. c. 58, as “obsolete.” See 1 Peck. 57.

(*h*) 11 Com. Jour. 202. See also the *Westbury Case*, 9 Com. Jour. 663, 679, on the same point.

(*i*) 24 Com. Jour. 92. See also *Cumberland*, 32 Com. Jour. 361; and *New Shoreham*, 33 Com. Jour. 69, 157.

(*j*) See *Middlesex Case*, 2 Peck. 30.

(*k*) No case is reported in the Journals of a censure on a returning officer for returning the majority candidate even when his disqualification was open and notorious. Where a returning officer, after full warning, returned a minor (who was also his brother-in-law), who had received a majority of votes, the committee held the return “vexatious,” but passed no censure on the returning officer: *Flint*, 1 Peck. 526. The only case found in the Journals of a returning officer escaping censure for returning a minority candidate is *Bedford*, 21 Com. Jour. 34.

volved in the issues of law raised, and the mind of the Court was directly drawn to and distinctly expressed upon the subject. The language of a decision is not to be construed as a statement of abstract propositions without limitation, but in connection with the particular facts of the case, and the specific matters had in view when the language was used ; and when applied to an essentially different state of facts is to be understood as subject by implication to many limitations and restrictions. When a case has been decided in an appellate Court and afterwards comes there again, only such questions will be noticed as were not determined in the previous decision ; the points of law already adjudicated become the law of the case. But if the facts change on a second trial, the whole case may be open again.

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MAY, 1887.

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## THE POWERS AND RESPONSIBILITIES OF RETURNING OFFICERS AT PARLIAMENTARY ELECTIONS.

**B**Y the common law of England the sheriffs were returning officers for county elections; and to them the writs of election were invariably directed (*a*). All local and other elections were held in the sheriff's County Court (*b*). The sheriff was also returning officer for all cities or boroughs within his county; and he issued a precept to the proper corporate officer of such city or borough to hold the election; and when such election was concluded the officer returned the names of those elected to the sheriff, who thereupon made his return of all the members to the clerk of the Crown in Chancery (*c*).

And by the same common law the corporate officers named as returning officers in the charter of the borough, or the chief officer without any express nomination, were *ex officio* returning officers for borough elections (*d*); and the designation of such officer depended upon the terms of the charter, or on prescriptive right (*e*).

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(*c*) This practice was altered in 1882 and 1885, except as to places not municipal boroughs.

(*d*) Heywood on Borough Elections, 60.

(*e*) Cooke on Elections, 21. By the Act 6 V. c. 18 (Imp.), a returning officer is declared to be "every person to whom by virtue of his office, under any law, custom, or statute, the execution of any writ doth or shall belong, for the election of a member to serve in Parliament, by whatever name or title such person may be called."

## LEGISLATION AFFECTING THE NORTH-WEST TERRITORIES.

Last session the Dominion Parliament passed three Acts exclusively applicable to, and materially affecting, the political *status* and judicial and land transfer systems respectively of the North-West Territories. The first, "The North-West Territories Representation Act, 1886," brought into force from the fifteenth day of January, 1887 by proclamation, gives to the Territories the right, heretofore withheld, of direct representation in the Dominion Parliament. Four constituencies are constituted; two in Assiniboia; north of these Saskatchewan and the most westerly, Alberta, and each has the right to return one member. Many of the provisions of "The Dominion Elections Act, 1874," are incorporated with this Act, but not those regulating proceedings at the polls, as open voting is provided for. Enumerators are to be appointed to prepare voters' lists for use at the election, and there is no provision for the revision of these lists except by the enumerators themselves. But a man, whose name is not on the list, who claims to be entitled to vote, may, on polling day, have his name added by the deputy returning officer, and vote upon his taking the oath of qualification. Every person qualified to vote "shall be a *bona fide* male resident and householder of adult age, who is not an alien or an Indian, within the electoral district, and who has resided in such electoral district for at least twelve months immediately preceding the issue of the writ of election." An election is, at the time of writing, pending. Owing to the imperfect character of the voters' lists it is anticipated that considerable difficulty will arise at the polls. And, unfortunately, so far as the immediate return is concerned at any rate, it is left to the person tendering himself as a voter to judge and determine whether he is qualified or not. If he take the oath his vote must be recorded. A numerous

class, "cunning hunters, men of the field," until last year classed as Indians who, being half-breeds, lately exchanged their treaty privileges for scrip, will probably be entitled, as the owners of tepees, to vote as well as the best "householder." The measure, far from perfect as it is, grants a substantial instalment of justice to the vast country which it affects, and terminates the scandal of a large body of British people living under and submitting to a Government and taxation in which they have no voice.

An Act of greater interest to lawyers, as such, is chapter 25, "An Act further to amend the laws respecting the North-West Territories." This Act, which came into force by proclamation on the eighteenth day of February, 1887, constitutes "The Supreme Court of the North-West Territories, to consist of five *puisne* judges to supersede the stipendiary magistrates who heretofore administered the civil and criminal law, and provides that the Court shall sit in *banc* at the seat of Government at such times as the Lieutenant-Governor appoints, and the senior judge present shall preside. Some, at all events, of the present stipendiaries will doubtless be appointed to the Bench, and it is difficult to see why the senior should not be styled Chief Justice. It is not strictly correct to style all the judges of a Supreme Court *puisne*. *Puisne* to whom? or to what? These judges will simply hold court generally at such places as they have been used to have been held by the stipendiaries, but at fixed times. Under "The North-West Territories Act, 1880," certain Acts only named in a schedule, and such others as might be proclaimed of the Parliament of Canada, were prior to the coming in force of the Act I am discussing in force in the Territories. Now, by section two of this Act, "Every Act of the Parliament of Canada, except in so far as the same is, by its terms applicable only to one or more of the Provinces of Canada, or in so far as any such Act is, for any reason, inapplicable to the Territories, shall apply to and be in force in the Territories." This is a very valuable provision. There always was some uncertainty as to whether any particular Act not named in the Schedule to the Act of



1880 was in force or not, and after a great deal of laborious research the practitioner would frequently be disappointed by finding that an Act of salutary provisions with which he was familiar in Ontario or another Province did not prevail. Subject to this provision, the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July, 1870, are declared to be in force in the Territories, so far as the same are applicable, and so far as they have not been repealed, altered, etc., by any one of the competent authorities mentioned. And by section 14, the Court shall for the administration of the laws for the time being in force within the Territories, possess all such powers and authorities as by the laws of England are incident to a Superior Court of civil and criminal jurisdiction ; and shall have, use and exercise all the rights, incidents and privileges of a Court of Record as the same were on the fifteenth day of July, 1870, used, exercised and enjoyed by Her Majesty's Superior Courts in England. A magnificent system of jurisprudence is introduced by these provisions. In Ontario, the law of England, up to a certain day in 1792, prevails, whereas here we have the great Code of English law up to the date of the transfer from the Hudson's Bay Company to the Crown. This is similar to the Manitoba system. Procedure in criminal cases is also placed upon a satisfactory and intelligible footing by section 20, which provides that "The procedure in criminal cases shall, subject to any Act of the Parliament of Canada, conform as nearly as may be to the procedure existing in like cases in England on the 15th day of July, 1870 ; but no Grand Jury shall be summoned or sit in the Territories." Power is given by the Act to the Lieutenant-Governor in Council to make ordinances "in respect to the mode of calling juries in criminal as well as civil cases, and when and by whom and the manner in which they may be summoned or taken, and in respect to all matters relating to the same." Pursuant to this power, an ordinance, No. 4 of 1886, has been made, dealing with the mode of selecting jurors and as to challenge in civil cases. But it will be observed that no power is given to increase

the number, and the provisions of the Act of 1880, section 76, sub-section 5, amended by section 76, sub-section 5, amended by section 5 cap. 51, of 1885, whereby, in all criminal cases (other than some few excepted cases which are triable without a jury), the "Stipendiary Magistrate and a Justice of the Peace, with the intervention of a jury of six, may try any charge against any person or persons for any crime," are still in force, and in civil cases the number is the same. The number of six for a jury is too small. There is no magic in the time-honoured number twelve, and perhaps an odd number, if high enough, would be preferable; but in criminal cases where, it is submitted, a Justice of the Peace must still be associated with the Judge, constituting in fact a bench of two Judges, there should not be less than twelve jurors. Especially is this so as there is no Grand Jury. In Manitoba, in civil cases, nine of a jury of twelve can return a verdict. Here the six must tender a unanimous verdict. Another reason for an increased number is that in several of the judicial districts there are two races and two tongues—the English and the French—and a mixed jury is sometimes desirable. So far as the population are concerned there would be no difficulty in procuring within reasonable distances of the places where the Courts are in the habit of sitting a sufficient number of capable jurymen to fill the increased panel.

Provision is made by the Act for the passing of "Ordinances by the Lieutenant-Governor in Council in relation to the administration of justice in the Territories, and to the constitution, maintenance and organization of the said Court" [the Supreme Court of the North-West Territories], "including procedure therein in civil matters." Under this provision "The Judicial Ordinance of 1886" has been passed. It consists of 460 sections and an appendix, and by section 456 declares that "When no other provision is made by this Ordinance, the procedure and practice existing in England, on the first day of January, 1885, shall (adapted to the circumstances of the Territories) be followed, as nearly as may be." The

ordinance has been very carefully and elaborately prepared, and the framers have had recourse to the English and Ontario Judicature Rules; the Nova Scotia Judicature Act: the Code of Civil Procedure of Quebec; the Revised Statutes of Ontario and Manitoba, and previous ordinances of the North-West Territories; but they appear principally to have drawn from the English system. The practice provided appears to be (with all deference to the learned and painstaking Judge who had charge of the bill in the Council, be it said) too cumbrous and costly for the circumstances of a new country and the style and importance of causes which ordinarily arise therein.

The Supreme Court constituted is the *only* Court of civil jurisdiction; and here it may be said that the title is a misnomer. But the framers of the ordinance are not responsible for this. Why Supreme? Where is the Inferior Court? In England there are County Courts; in Ontario Division Courts, and in Manitoba County Courts, with expeditious, simple and inexpensive procedure. These Courts have jurisdiction in causes the like of which in the North-West Territories must be entered in the Supreme Court. It is true that there are two scales of costs, and the tariff is not high under either scale, so that the public have not so much reason to complain as the advocate who is required, under the lower scale, to do a great deal of work for a very small bill of costs. In the advocate's favour there is the fact that it is almost impossible for a layman to be his own lawyer. There will be, in nearly all cases, certain technical work which few suitors could successfully accomplish. In towns or places other than where the Judge resides Courts are held very infrequently (in the writer's town twice a year only), and if justice delayed be justice refused there will often be refusal. Owing to distance and lack of facility for communication in many instances it will be absolutely impossible to make required chamber applications within certain limited times. The profession in the Judges' towns will, of course, be benefitted at the expense, to a considerable extent, of their brethren in the outlying districts. Appeals lie from a single Judge to

the Court in *banc* where the matter in controversy in contract exceeds five hundred dollars. The right of appeal to the Queen's Bench of Manitoba is taken away.

"The Territories Real Property Act" (the Torrens System) which came into force on the first day of January, 1887, will probably work satisfactorily, but has not yet received practical test. Certain it is that the system, if it be a good one, is opportunely introduced now while there are few registered titles, and these generally susceptible of easy and conclusive proof.

ROBT. STRACHAN.

EDMONTON, N. W. T.,  
February, 1887.

## EDITORIAL REVIEW.

**Revision of the Rules.**

The draft scheme for the complete revision of the rules of practice has been prepared and distributed amongst a number of the profession, it being impossible to reach them all. The suggestion that the profession should have a voice in the revision originated with the County of York Law Association. It was quickly followed by other Associations with the result that a joint committee of the York, Wentworth, and Middlesex Associations was formed. The joint committee voluntarily took upon themselves the burden of revising the whole body of rules, but soon found that that course was impracticable. They have therefore employed draftsmen to do the work, but they retain jurisdiction over them, and as the work is submitted to them from time to time during its progress will have the opportunity of discussing the propositions which are advanced, and of criticising the whole work. The advantage of bringing the work before a representative committee is obvious. Various suggestions founded upon experience in practice will receive consideration, and the draftsmen will have the great advantage of having their work submitted to debate and criticism at a time when they may rectify their errors. It is quite obvious that such reforms as are openly discussed in the profession cannot be effected without legislation, and it is the hope of many that a Code of Civil Procedure may pass the Legislature during next session, and supplant all existing rules of practice.

The present diversity of practice is due to the fact that the judges of the Common Law Divisions and those of the Chancery Division revert when occasion offers to the practice of their Courts which obtained before the judicature act. The weekly sittings of the court were regulated immediately after the passing of that act by the re-enactment of the rules which governed them before it was

passed ; and the mode of bringing cases before the courts was similarly dealt with. Other more important traditions were revived from time to time, until it may truly be said that we have, after six years experience of a fusing act, one practice for the Chancery Division, and one for the other divisions. It is evident that the ground work of any reform which tends towards assimilation of the practice is the obliteration of all limits or boundaries between the Divisional Courts. As long as a Chancery Division exists as such we may rest assured that a distinctively peculiar chancery practice will exist to the confusion of all who are not versed in its mysteries. It seems to be considered a fundamental principle of English jurisprudence that there must be three or more courts, and that justice cannot be properly administered without such a system. The fact is that in Ontario we are peculiar in that respect, and though the theory is clung to, it is not founded upon fact. The three divisions are at present constituted dispose of all business without regard to its nature, but one of these adopts a different mode of doing its business from the others. There is no reason for this other than that which rests upon the traditions of the Court of Chancery. Hence, if the division of the High Court into three permanent parts were abolished, no excuse would remain for creating or continuing diversities of practice.

The next fundamental change to be made is to compel a suitor to proceed in the same manner for relief in all actions. There exists no sound reason why, when part of the relief asked for is the arrest of a debtor, a totally different and peculiar kind of action should be commenced. The only difference in principle between an ordinary action of debt and an action commenced by *capias* is that the plaintiff in the latter action desires to hold the person of the defendant under sufficient sureties. This can be done by moving in a proper case to have him arrested and detained while the action proceeds as in the ordinary way to judgment. So with replevin. The taking of the goods is a summary remedy or species of relief granted under extraordinary circumstances while the title to the goods is being

tried. The title to the goods can be tried just as well in an action to recover the goods as in an action of replevin, and where the plaintiff desires to recover the goods pending the action, he can proceed effectually by applying for them as a measure of extraordinary relief while the action to try the title proceeds as in ordinary cases to judgment. And the same with attachments against absconding debtors. The only objection that can be urged against the change is that a debtor might abscond before an ordinary writ of summons could be issued, or goods might be disposed of in like manner before they could be replevied. But jurisdiction should be retained to grant an order for extraordinary relief at any time. It is not an unusual thing for an injunction to be granted before writ issued, the writ being issued at the earliest possible moment thereafter. And the same practice might be observed with respect to other extraordinary remedies.

A matter of minor importance suggests itself at this juncture. Where it is necessary at present in an emergency to draw affidavits and other papers before issuing the writ, they cannot be properly entitled; for it is never known what Division the writ will issue from; while if the High Court existed without divisions they could always be properly entitled in the first instance.

The suggestion to have fixed and more frequent sittings of the Court for trials seems to have met with great favour. It seems to be the universal opinion that cases would be better prepared if the date of the sittings were known some time before; and that if smaller lists were prepared for trial the cases would be better tried. The Nova Scotia Judicature Act provides for fixed dates; and in Manitoba a case may be tried in any week at sittings of the Court held for that purpose.

The more frequent the sittings for trials the more frequently would Divisional Courts or Courts of Review be obliged to sit. Opinion upon this point varies. Some are for having the Courts sit every month. Others would have them sit every week. Perhaps some gentlemen would like the Court to be screwed down to the Bench. But there is

a unanimous opinion abroad that at present the sittings are too few.

Entering more into details of practice we find ample scope for reform. There are at present either six or seven different modes of referring the matters in an action. And when a reference is taken in one way, the unsuccessful party, unless the order of reference is express, usually tries to show that it was, or should have been, in one of the five or six other ways that were not adopted. So that where a party has succeeded in getting an award or a report, or whatever it may be called, he is only at the beginning of troublous times, and may have as much difficulty in getting the fruits of his work, as he had in succeeding before the referee or arbitrator. As the object is the same in every case of reference, there is no valid reason why one mode of procedure should not suffice.

With respect to moving against judgments and verdicts, perhaps too much praise cannot be accorded to the Chancery Division for the example set. There is only one way of moving there, namely by notice of motion given seven clear days before the return, and set down seven clear days before the first day of the sittings of the Court. Whether this practice is right or wrong, it certainly has the advantage of being symmetrical. On the other side of the Hall two modes are adopted, by order nisi, and notice of motion; and sometimes both are resorted to in the same case. Granted that there should be a uniform mode of procedure, the question is whether the proceeding by order nisi or that by notice of motion is preferable. For the order nisi it is urged that a great number of motions are stopped by the refusal of orders nisi, with the double advantage that expense is saved, and the Court is relieved from hearing at length many motions which would otherwise have to be fully argued. As to the expense, the parties may well be left to attend to that themselves. The only difference between the expense of proceeding by order nisi and proceeding by notice of motion is in the fees of the opposing counsel in the latter case. The evidence and other papers necessary to sustain the case of the party moving are as neces-



sary in moving for an order nisi as in moving on notice. As to saving the Court from unnecessary work, we do not believe that that is a necessary result of the system. Many an order nisi is moved for as a tentative measure solely, where the party moving would hesitate to give a notice of motion. It was the constant practice of a late eminent judge when at the Bar to refuse to give his opinion as to whether a motion in term was likely or not to succeed. He invariably informed his clients that the opinion of the Court was better than is his own, and could be obtained at less expense. And the invariable result was that a motion was made for a rule nisi, and the burden of examining the evidence was shifted from his own shoulders to that of the Court.

For the notice of motion it may be urged that the unsuccessful party will carefully consider whether there is any hope of succeeding, as he runs the risk of paying the costs of the opposite party as well as his own in case of failure. And it may be taken for granted that no motion will as a rule be taken before the Court unless there is a substantial question to be argued. The Court will thus be relieved of examining evidence and practically advising parties whether there is anything in their cases which deserves to be argued.

The lists of the Chancery Division when compared with those of the other Divisions may furnish some indication of the truth of this. They are always smaller than the others, though, as the writs issue in rotation from the three Divisions, there is no reason apparent why this should be so unless it is due to the notice of motion system.

One might proceed *ad infinitum* to detail the petty annoyances that arise out of minute and useless distinctions that are made according as one has to visit one particular room or another. A precept that will be taken in one office will be relentlessly refused in another. A paper folded lengthwise will not be received in one room, while if folded crosswise it will not be received in another. If an order is to be issued in the Chancery Division it has to be drawn in one form, while, if it is to be issued in a Common Law Division it must be drawn in another form, though the sub-

stance remains precisely the same. Uniformity in this respect can only be secured by bringing all such matters under one individual jurisdiction. Let the officer be bound hand and foot with red tape, if you will, but let us know how he is bound once and for all.

#### **Title under the Devolution of Estates Act.**

A nice point arises under *The Devolution of Estates Act, 1886*, as to making title to land by an administrator.

Before this Act was passed the heir at law, upon an intestacy, was bound to adduce proof of the intestacy. Letters of administration, according to English law, are not conclusive proof, though, if acted upon for some years, intestacy may safely be presumed. Under our system of registration, however, a devisee is postponed to a purchaser from the heir at law if he does not register the will within a year from the death of the testator, or within a year from the removal of any inevitable difficulty which may have prevented the registration. The result of this is that it is not absolutely necessary that the letters should have been acted upon for many years in order to become sufficient evidence of intestacy; for at the expiration of a year from the death of the owner of the land, if no will be then registered, the letters of administration become evidence not so much of intestacy as of the ability of the heir at law to make a good title to a *bona fide* purchaser without notice, if the purchaser promptly registers his conveyance. There always remains the contingency of an impediment to the registration of a will; but experience shows that such impediments are rare. The result of this is that in the absence of conclusive proof of intestacy (if there be such a thing as conclusive proof of a negative) it was not safe to purchase from an heir at law within a year from his ancestor's death, though a purchaser would be reasonably safe after the lapse of that period.

The introduction of *The Devolution of Estates Act, 1886*, makes this sole change, that instead of devolving upon the heir at law upon intestacy, the land devolves upon the

administrator. The same evidence of intestacy must be given as before, i. e., evidence sufficient in character and degree to induce belief in the intestacy. The letters of administration are manifestly no better evidence of intestacy since the Act than they were before it. They are the only evidence of title that can be produced; but that simply dispenses with the necessity for the proofs which were formerly necessary to establish the relationship between the heir at law and his ancestor—the letters being the evidence, upon the supposition of intestacy, that the administrator can make title. It may still happen that an undiscovered will may be found and registered; and if this should occur within a year from the death of the testator it would deprive a purchaser from the administrator of his title to the land. It may therefore be quite possible that in the absence of conclusive proof of intestacy a purchaser may not be compellable to accept a conveyance from an administrator within a year from the death of the *defunctus*. It is true that payments made *bona fide* to an administrator whose letters are afterwards revoked are a legal discharge to the person making them; but it does not by any means follow that an administrator whose letters are afterwards revoked can make title.

#### Reporting.

A communication appears in this number as to the reporting. Our correspondent might have added to his museum a monstrosity from 12 App. R. 805, where *Caston's Case* (which determined that a solicitor who subscribed for stock on condition of being made the company's solicitor, was a contributory), is placed in the Digest under "Water Lots."

When three or four men combine to form a volume, the work is not, as a rule, as well done as when one man has complete control over the whole volume. And when the digest number is compiled in turn by the several reporters, we may expect that each one will produce an arrangement of his own, unless he is bound down by some strict system. There is no doubt that we are departing from the strict and

technical language of older lawyers, whose precise and accurate phraseology, and whose close and technical classification had at least this advantage that it reduced to system and order the whole law. At the present day one may search an index for hours without finding a trace of what is known to be indexed somewhere—the reason being either want of familiarity in the searcher with the proper catch word, or disregard of it in the compiler of the index, the latter as frequent a reason as the former. And the same with a digest. The writer spent a week or ten days during last summer in looking for the case of *Farrell v. Cameron*, 29 Gr. 313, which for want of being properly classified is practically lost in the Digest. The case decided that a widow of fifty-three years of age who had never had any children was entitled to a reconveyance from trustees of land conveyed to them in settlement on her marriage, the remainder after the death of herself and her husband being limited to her issue in fee. The case turned upon the presumption frequently acted upon that she would never have any children. One would naturally expect to find the case under title *Evidence*, sub-title *Presumptions*, but it is placed in the Digest under the title *Husband and Wife*, sub-title *Marriage Settlements* in one place, and under the title *Trusts and Trustees*, sub-title *Miscellaneous Cases* in another.

#### **The late Sheriff Jarvis.**

The sudden death of the late Sheriff of York deservedly caused universal expressions of regret. During his incumbency no office was better administered, and he added to it the dignity which was its due. It is a remarkable thing that for the past sixty years this shrievalty has been held in the same family, the predecessor of the late sheriff having been his uncle.

The office is now divided into two, one sheriff having jurisdiction in Toronto only, and the other in the county.

**The Jurist.**

We inadvertently omitted to notice a new periodical with the above title which commenced with the present year. It is issued monthly. In addition to editorials and contributed articles, it contains notes of cases ; and a large space is devoted to the interest and welfare of students.

**Sir Matthew Crooks Cameron.**

The Honour of Knighthood has been conferred upon the Chief Justice of the Common Pleas. We understand that the distinction was also offered to the Chancellor and the other Chief Justices, but for reasons which have not been made public it was declined.

**Corrections.**

In the case of *O'Rourke v. Campbell*, 7 Occ. N. 237, read "furnished no answer to the action." In *Scott v. Scott*, same page, read "validly executed."

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## BOOK REVIEWS.

*An analysis of the Eighth Edition of Snell's Principles of Equity, with notes thereon.* By E. E. Blyth, LL. D., B.A. (Lond.) Solicitor, &c., &c. Second Edition. London: Stephens & Haynes. 1887.

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*Questions on Equity.* For students preparing for examination. Founded on the eighth edition of Snell's Principles of Equity. By W. T. WAITE, Barrister-at-Law; Holt Scholar of the Honourable Society of Gray's Inn. Third Edition. London: Stevens & Haynes. 1887.

These two little books are essentially "cramming" books, the latter being more useful and innocuous than the former. As a guide to the contents of Snell's Equity the former may be found useful, but as a medium of knowledge it will be most hurtful. The best exercise for a student is to make an analysis of his text books for himself as he reads them; but to attempt to acquire knowledge by means of an analysis is dangerous.

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## CORRESPONDENCE.

**Reporting.**

*To the Editor of the Canadian Law Times :*

SIR,—Attention is somewhat forcibly drawn to the subject of reporting by the large item of expenditure that appears under that head in the abstract of the balance sheet for 1886 of the Law Society of Upper Canada distributed with the last number of the Appeal Reports. Having in view that expenditure it may fairly be doubted whether the reporting is at present what it should be. At all events the following improvements may reasonably be asked for :—

1. Publication of the numbers at definite regular intervals. There should be no difficulty about this now that the cases of all the Divisions are embraced in the same series of volumes.

2. Publication of the Digest Number within a reasonable time after the completion of the volume. The last number of Vol. XII was received at the library on the 25th February. Two months have elapsed and the Digest Number is not yet published, and this delay is not unusually long.

3. A uniform system of classification in the Digests of the various volumes. In one volume, for instance, one finds all cases upon insurance under that head ; in another, not even a cross-reference under Insurance, and perhaps several decisions under Fire Insurance, Life Assurance or Marine Insurance.

4. More care in the preparation of the Digests. In one late volume a decision upon the question of refusing to allow a case to go to the Jury may be found under the heading, "Withdrawing case from Jury," without even a cross-reference under the word "Jury." In another late volume a case deciding that where a policy of assurance provides that the loss shall be payable in Montreal an action will

not lie here, appears under the heading "Executors and Administrators," apparently because the unfortunate deceased had to entrust a gentleman of the latter class with the duty of bringing the action. Under "Contract" or "Insurance" there is nothing to call attention to this authority. Compare in this connection Beach on Contributory Negligence :—" Darkey, stealing chickens by a—"

5. Decrease in the number of typographical and grammatical errors. In the last number of the Ontario Reports, (No. 1, Vol. XIII) there are more than thirty typographical errors, and grammatical errors are not infrequent.

Yours, &c.,

R. S. CASSELS.

Toronto, 28th April, 1887.

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## REVIEW OF EXCHANGES.

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*American Law Review.*—September-October, 1886.

**Warranties and Conditions in Sale,** by CHARLES M. BARNES. A valuable article citing English and American cases.

**Should Trial by Jury in Civil Cases be Abolished ?** by WILLIAM L. SCOTT. The learned writer is decidedly in favour of abolishing trial by jury. Many of the defects in jury trials are peculiar to the United States, but the treatment is not confined to these.

**The Clearinghouse in the Grain and Stock Exchange,** by MERRITT STARR. After a discussion of several leading cases the learned writer sums up as follows:—"The present tendency of the decisions, and I believe the inevitable result of the discussion, is accurately summed up in Judge Gresham's charge to the jury at the original trial of *Irwin v. Williar*, 11 Biss. 57, in the following simple words:—"These customs are founded in commercial convenience; they are not in contravention of the law, and they are valid.'"

**The Legal Aspect of Industrial Co-partnership,** by FREDERICK E. SNOW. The nature of an industrial co-partnership is stated, in which employees may share profits without becoming partners. The leading cases in partnership law are applied.

**Assignments of Patents,** by WILLIAM COLEBROOKE. The subject is treated under the following heads:—Title of the Assignee; Title of Assignees before Issue; Title of the Assignee to Re-issues or Renewals and Extensions; Assignee as subject to Equities; Enforcement of the Security.

**The Proposed Civil Code of New York,** by CHARLES W. PLATT.

**A Divorced Person's Right and Capacity to Marry,** by DAVID STEWART.

**An Attorney's General or Retaining Lien,** by LEONARD A. JONES. The subject is discussed in two heads:—Upon papers and property, upon moneys collected.

*Ibid.*—November-December, 1886.

**An Attorney's Special Lien on Judgments,** by LEONARD A. JONES. The subject is treated under the following heads:—Definition and origin of the lien; in what States it prevails; whether the lien is

limited to taxed costs or includes fees; rule that there is no lien until judgment has been entered; settlement of suit by the parties before judgment in fraud of the attorney; lien upon the cause of action by agreement or assignment.

**Limited Partnerships**, by SIDNEY G. FISHER. The partnerships dealt with are those creations of the law whereby special partners, upon complying with certain conditions are limited in their liability. Though they are permitted by Statute in this Province they are not frequent. A number of American cases are cited.

**Foreclosure of Railway Mortgages**, by R. MASON LISLE. "Does the sale of a railroad company, whose charter is irrevocable, under the foreclosure of a mortgage, necessitate its reorganization under the laws, constitutional or otherwise, in existence at the time of sale, or does the old corporate existence pass to the purchasers?" After a review of the authorities the learned writer concludes as follows:—"It is undoubted, both upon principle and by the decisions of the Courts of the country, that under a legislative authority to mortgage 'all the rights, privileges and franchises' of a railroad company with an unalterable charter, the company executing such a mortgage will at a foreclosure sale, pass to the purchasers the corporate existence."

**The Responsibility of Banks and Bankers for their Correspondents and their Notaries**, by FRANCIS B. PATTEN. With respect to correspondents the learned writer says: "Courts of high authority are opposed to each other on this question, but the predominant opinion appears to be decidedly in favour of holding the bank absolutely responsible to its customer for the negligence of its correspondents." With respect to notaries it is said that in those jurisdictions where a bank is held free from liability for the default of its correspondent it would also for similar reasons be held that it is not liable for the default of a notary whom it employs. There is an additional reason urged why this is so, namely, that the correspondent must, or at least is expected to, employ a notary to protest the bills, and having duly selected one it is not under any further liability. It matters not that inland bills do not require to be protested, if the usage is to protest them.

*Albany Law Journal*.—22nd January, 1887.

**Common Words and Phrases**. Notify; poison; cousin; inclose; habitual drunkard, are defined.

*Ibid.*—5th February, 1887.

**Insurance—Delivery of Policy without Payment of Premium**, by SIDNEY G. FISHER. A number of American cases are cited.

*Ibid.*—12th March, 1887.

**The Law of Extradition**, by SAMUEL T. SPEAR. After citing the leading cases on the point whether a fugitive delivered upon one charge can be tried for another, the learned writer cites the case of the *United*

*States v. Rauscher*, decided by the Supreme Court of the United States. The prisoner had been extradited on the charge of murder on the high seas and was put on trial for the offence of administering cruel and unusual punishment to the murdered man. The Supreme Court answered that there was no jurisdiction to try him for the latter offence. The learned writer concludes: "The State that has received a fugitive criminal for a specific purpose, should, after that purpose has been answered, interpose no legal obstacle to his return to the State from which he was removed. This principle is as sound in inter-state extradition as it is when the extradition is international."

*American Law Register*.—January, 1887.

**Subscriptions**, by HENRY WADE ROGERS. In the case of voluntary subscriptions for educational, charitable, religious and other like purposes, there are cases which recognise the doctrine that the consideration upon which the subscriber's promise is founded is the promise of the others to contribute to the same object; others hold the obligation of the promisee to apply the money to the purpose for which it was subscribed is a sufficient consideration; while others assert that a subscription is in the nature of an offer which becomes binding when accepted by the promisee, and that when work has been done or expense incurred in consequence of the subscriptions the liability is fixed. It is not necessary that a payee should be named. Subscriptions may be withdrawn at any time before the persons designated to receive the money assume their duties, or some person incurs expense relying on the subscriptions. Subscriptions are treated as several, though the promise is in general terms. Subscriptions for stock are then treated of, and the effect of misrepresentations to induce subscription. English, American and Canadian cases are cited.

*Ibid.*—February, 1877.

**Limitations on Legislative Contracts**, by JAMES P. ROOT. This article deals with the limited powers of the American constitution.

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# THE CANADIAN LAW TIMES.

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JUNE, 1887.

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## CONSTRUCTIVE OR IMPUTED NOTICE DERIVED THROUGH TRUSTEES, SOLICITORS OR OTHER AGENTS.

THE following article consists of extracts from lectures delivered before the students of the Law School, at Osgoode Hall, Toronto.

*General Rule.*—It is a general rule of law that proof of notice to or knowledge on the part of a trustee, solicitor or other agent, of any fact concerning the subject matter of his agency, which it is his duty to communicate, operates as presumptive evidence of notice of that fact to the *cestui que trust*, client or other principal.

*Doctrine not to be extended.*—There appears to be a consensus of opinion on the part of the Judges that the whole doctrine of constructive notice is one which has gone quite as far as it should go, and that in future it is to be restricted and not extended. In *Attorney-General v. Stephens* (a), Lord Chancellor Cranworth says: "The length to which the doctrine of constructive notice has been extended has been often productive of very considerable inconvenience and has injuriously impeded the free transfer of real property" (b).

(a) 6 De G. M. & G. at 148.

(b) And see *per* Lord Chancellor Westbury in *Wyllie v. Pollen*, 3 De G. J. & Sm. at 601.

In *Ware v. Lord Egmont* (c), Lord Chancellor Cranworth says: "I must not part with this case without expressing my entire concurrence in what has on many occasions of late years fallen from Judges of great eminence on the subject of constructive notice, namely, that it is highly inexpedient for Courts of Equity to extend the doctrine, to attempt to apply it to cases to which it has not hitherto been held applicable. Where a person has actual notice of any matter of fact, there can be no danger of doing injustice, if he is held to be bound by all the consequences of that which he knows to exist. But where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say, not only that he might have acquired but also that he ought to have acquired, the notice with which it is sought to affect him, that he would have acquired it but for his gross negligence in the conduct of the business in question." Lord Chancellor Chelmsford quotes this passage with approval in *Montefiore v. Browne* (d).

*Knowledge must be acquired during agency.*—It is apparent that there must be some limit in time within which this doctrine of constructive notice through an agent can be applied. It is easy to imagine cases in which notice or knowledge of a fact was acquired by a man so long ago that it would be highly improper to impute knowledge of such fact to a person who may now or at any time hereafter employ that man as his agent. Great doubt and difference of opinion have arisen upon this question, some judges holding to the view that in order to fix a principal with constructive notice of a fact, upon the ground that he has employed a person as his agent, who, at the time of his employment, had already acquired knowledge of the fact in question, it is only necessary to show that the agent acquired such knowledge within such period of time, or under such circumstances as will cause the Court to conclude that he bore the matter in mind at the time of his employment as such agent. Other Judges have held that

(c) 4 De G. M. & G. at 473.

(d) 7 H. L. C. at 262.

in order to fix the principal with such notice it is necessary to show that the agent acquired notice or knowledge of the fact during the period of his agency.

The leading case in support of the latter doctrine is *Mountford v. Scott* (e), in which Sir John Leach, V.-C. says, (at p. 40): "The agent stands in the place of the principal, and notice therefore to the agent is notice to the principal; but he cannot stand in the place of the principal until the relation of principal and agent is constituted; and as to all the information which he had previously acquired the principal is a mere stranger." This case was subsequently reversed by Lord Eldon (f), upon a ground not requiring any expression of opinion upon the question of constructive notice, but his Lordship does express an opinion upon the point saying that the Vice-Chancellor had decided the case upon the notion that notice to a man in one transaction is not to be taken as notice to him in another transaction, and adding that "In that view of the case it might fall to be considered whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say, that if an attorney has notice of a transaction in the morning, he shall be held in a Court of Equity to have forgotten it in the evening; it must in all cases depend upon the circumstances."

Lord Chancellor Hardwicke speaking of the rule that notice to an agent, in order to be imputed to his principal, should be acquired during the period of his agency, says:—"This rule ought to be adhered to, otherwise it would make purchasers' and mortgagees' titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions (g)," and the same learned Judge in a subsequent case (h) says:—"It is settled that notice to an agent or counsel *who was*

(e) 3 Mad. 34.

(f) 1 Tur. & Rus. 274.

(g) *Warrick v. Warrick*, 3 Atk. at 294.

(h) *Worsley v. Earl of Scarborough*, 3 Atk. 392.

*employed in the thing by another person, or in another business and at another time is no notice to his client who employs him afterwards; and it would be very mischievous if it were so, for the man of most practice and greatest eminence would then be the most dangerous to employ."*

The cases holding this doctrine are collected and commented upon by V.-C. Wigram in *Fuller v. Bennett* (i), where he says :—"The general propositions; first, that notice to the solicitor is notice to the client; secondly, that where a purchaser employs the same solicitor as the vendor, he is affected with notice of whatever that solicitor had notice in his capacity of solicitor, for either vendor or purchaser in the transaction in which he is so employed; and thirdly, that notice to the solicitor, which alone will bind the client, must be notice in that transaction in which the client employs him,—have not, as general propositions, been disputed at the Bar; but with respect to the last proposition it was argued, for the plaintiffs that where one out of two matters follows so close upon the other that the earlier transaction cannot have been out of the mind of the solicitor when engaged in the latter, there is no ground for restricting the notice to the client to the second transaction only, and that he will be affected with notice of both, and for this reference was made to *Winter v. Lord Anson* (j), *Mountford v. Scott* (k), and *Hargreaves v. Booth*, (l), to which I may add the case of *Brotherton v. Hatt* (m). \* \* Cases may easily be suggested, in which it would be impossible that a solicitor should have forgotten a fact recently under his view, with notice of which, however, it would be impossible to affect his client, unless the circumstances of his being solicitor for two parties be introduced into the case. And it is equally clear, where that circumstance forms part of the case, that a purchaser may be affected with notice of what the solicitor knew as solicitor for the vendor, although as solicitor for the vendor he may have acquired his knowledge before he was retained.

(i) 2 Hare 402 *et seq.*

(k) T. & R. 274.

(m) 2 Vern. 574

(j) 3 Russ. 488.

(l) 1 Keen 154.

by the purchaser. Whatever the solicitor during the time of his retainer, knows as solicitor for either party, may possibly in some cases affect both, without reference to the time when his knowledge was first acquired. \* \* *The rule that notice to the solicitor will not bind the client, unless it be in the same transaction, or at least during the time of the solicitor's employment in that transaction, I have always understood to be a rule positivi juris, adopted by Courts of Justice in favor of innocent purchasers; and the reason and policy of the rule appear to me to shew that such is the case.* \* \* The expression commonly used in explaining the rule, namely, that the agent may have forgotten the former transaction, points at the same conclusion; and I cannot think that Lord Eldon in the language he used extra judicially in *Mountford v. Scott*, intended to shake the general doctrine which himself, as well as Lord Hardwicke and other Judges had so often insisted on; *Warrick v. Warrick* (n), *Steed v. Witaker* (o), *Hiern v. Mill* (p), *Mountford v. Scott* (q), *Kennedy v. Green* (r). It is not necessary so to understand Lord Eldon's language when construed, with reference to the circumstances of the case before him *The rule limited as above is, I presume to say, best adapted to, and fully sufficient for the purposes of justice.*"

Lord Westbury, L.C., in speaking of this question (s) says:—"To affect the principal with notice, the agent's knowledge must have been derived in the particular transaction in hand, or be shown to have been in that transaction present to his mind."

Somewhat difficult to be reconciled with the latter part of this proposition is the statement of Mr. Justice Fry in *Kettlewell v. Watson* (t), that "The Court, therefore, re-

(n) 3 Atk. 294.

(o) Barnard. Chan. Rep. 220.

(p) 13 Ves. 120.

(q) 3 Madd. 34.

(r) 3 Myl. & K. 699.

(s) *Wyllie v. Pollen*, 3 De G. J. & S. at 601, and see notes to that case in the American Ed. of that report.

(t) 21 Chy. D. 705, 706.



ceives evidence of the agency, and it receives evidence of the act of the principal, but it will not receive evidence whether the agent recollected the fact at the time, or whether he communicated it to his principal. It deals with those matters by way of irrebutable presumption where the circumstances are known."

The explanation may be found to be that Mr. Justice Fry used words laying down a more general proposition than he intended to express, and that he intended to carry his proposition no further than to say that the Court will not permit the agent to give direct evidence denying that he recollected the fact at the time, and will not permit either the agent or the principal to give direct evidence denying that the former communicated the fact to the latter, although both the recollection of the agent and the fact of communication to the principal may be negatived by the surrounding circumstances which may be adduced in evidence; and that when the surrounding circumstances are such as to raise the presumption that the agent did recollect the fact, and that he did communicate it to his principal, such presumption is incapable of being rebutted by direct evidence.

The American Editor of White and Tudor's Leading Cases states, as the result of the authorities, that the law "Forbids a man to acquire an advantage at the expense of his neighbour by using the eyes of another, but it does not ordinarily affect him with notice of that which he would not have learned with ordinary diligence if he had transacted the business in person. Notice to an agent consequently is not notice to the principal unless it occurs in the course of the transaction in which he represents the principal"; and the same learned editor, after discussing the cases, says:—"It results from these decisions that a principal is not chargeable with notice of that which is brought to the knowledge of the agent, while the latter is acting for himself or for a third person.

(u) Note of Am. Ed. to *Le Neve v. Le Neve*, 2 W. & T. L. C. 4th Ed. 169 and 170.

Such is clearly the rule where the transaction in which the notice is given is anterior" (v).

This doctrine was applied by the Supreme Court of the United States in a case where a company conveyed property to trustees to hold in trust to secure the persons who should thereafter purchase the bonds of the said company. It was held that the persons who did afterwards purchase the bonds of the company were not affected with constructive notice of irregularities, which were known to one of the trustees and which would have rendered the security invalid as against any person other than a purchaser for value without notice (w). In that case there was no selection of the trustees by the *cestuis que trustent*, but the purchase of the bonds *ipso facto* created between the parties the relationship of trustee and *cestuis que trustent* without the exercise of any volition on the part of the purchasers. The trustees were there selected and appointed by the company, and their powers and duties were prescribed by the company and not by the bondholders, and these facts are adverted to by the Court as furnishing a ground for decision.

In *Curtis v. Leavitt* (x), which is referred to in the lastly mentioned case, it is said:—"It is a necessary attribute of an agency that it should be created by the principal; it is an agreement by which the principal confides to the agent the management of some business to be transacted in his name and on his account and by which the agent assumes to do the business and render an account of it. The doctrine that notice to an agent operates as constructive notice to his principal is applicable only to cases where an agency in fact has been created; and in such cases only when the notice is to the agent while engaged in the same transaction or negotiation to which the agency applies."

It is apparently indicated by V.-C. Wigram, in *Fuller v. Bennett* (y), that where both parties to a transaction employ

(v) *Ib.* at 170.

(w) *Commissioners, etc., v. Thayer*, 94 U. S. 644, 645.

(x) 15 N. Y. at 194.

(y) 2 Hare 403-4.

the same solicitor, each of the said parties will be held to have implied notice of whatever such solicitor knows and ought to have communicated, and that in such cases the doctrine of implied notice derived through agents will be extended beyond its ordinary limits; no reason, however, is suggested as warranting the existence of any such extension of the general rule (z).

*Foundation of the doctrine.*—Lord Chancellor Westbury, speaking of this doctrine and of the kind of knowledge on the part of the agent which will be imputed to his principal, says:—“It must have been knowledge of something material to the particular transaction and something which it was the agent’s duty to communicate to his principal; *the whole doctrine of constructive notice resting on the ground of the existence of such a duty on the part of the agent*” (a).

The same ground for the doctrine is given by V.-C. Spragge (b), who says: “Now in the case of a solicitor the doctrine of notice to the principal proceeds upon the presumption that the knowledge will be communicated because it is the duty of the solicitor to communicate it; *in the case of a trustee it is presumed that he will give true information because it is his interest to do so.*”

It is submitted that the dictum of V. C. Spragge in the lastly mentioned case is not warranted either by principle or authority, in so far as it attempts to draw a distinction between the grounds for raising an implication of notice to a client derived through his solicitor and the grounds for raising an implication of notice to a *cestui que trust* derived through his trustee.

V.-C. Kindersley says: “It is a moot question upon what principle this doctrine rests. It has been held by some that it rests on this: that the probability is so strong that the solicitor would tell his client what he knows himself that it amounts to an irresistible presumption that he did tell him; and so you must presume actual know-

(z) See *Hargreaves v. Rothwell*, 1 Keen, 154. In *Brotherton v. Hatt*, 2 Vern. 574, the rule applicable to the employment of solicitors was held applicable to the employment of scriveners.

(a) *Wyllie v. Pollen*, 3 De G. J. & Sm. at 601.

(b) *Cameron v. Hutchison*, 16 Gr. at 532.

ledge on the part of the client. I confess my own impression is that the principle on which the doctrine rests is this: that my solicitor is *alter ego*: he is myself; I stand in precisely the same position as he does in the transaction, and therefore his knowledge is my knowledge; and it would be a monstrous injustice that I should have the advantage of what he knows without the disadvantage" (c).

"The doctrine of constructive notice depends upon two considerations; first, that certain things existing in the relation or the conduct of the parties, or in the case between them, beget a presumption so strong of actual knowledge, that the law holds the knowledge to exist, because it is highly improbable it should not; and next, that policy, and the safety of the public, forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, and yet all the while let his agent know, and himself, perhaps, profit by that knowledge" (d).

*The doctrine of Kennedy v. Green*,—A well defined limitation has been engrafted upon our general rule and has become generally known as the doctrine of *Kennedy v. Green* (e), speaking of which Lord Romilly says (f): "That case establishes that if the solicitor employed by the client was the actual perpetrator of a fraud, it is reasonably certain that he would not communicate that fact to his client, and that consequently the client cannot be treated as having had notice of that fact. I take the rule to be generally that the client must be treated as having had notice of all the facts which in the same transaction have come to the knowledge of the solicitor, and that the burthen of proof lies on him (the client) to show that there is a probability amounting to a moral certainty that his solicitor would not have communicated the fact to his client."

Vice-Chancellor Bacon defines the same doctrine as follows: "*Kennedy v. Green*, lays down a principle which

(c) *Bournot v. Savage*, L. R. 2 Eq. at 142.

(d) *Per* Lord Chancellor Brougham in *Kennedy v. Green*, 3 My. & K. at 719.

(e) 3 My. & K. 699.

(f) *Thompson v. Cartwright*, 33 Beav. at p. 185.

must commend itself to everybody's sense of justice. If a professional man is employed in a transaction, the law imputes to the client who employs him the knowledge which the solicitor so employed possesses. But then the law is subject to this plain qualification; if the disclosure of that fact of which knowledge is sought to be fixed upon the client would have imputed fraud to the solicitor, it is not to be presumed that the solicitor did make disclosure of that fact" (g).

Mr. Justice Fry, referring to the same doctrine, says: "There is another principle which undoubtedly is well established, and is an exception from the doctrine of imputed notice, that which is familiarly known by reference to the case of *Kennedy v. Green*. There it was held that the presumption, which arises from the duty of the agent to communicate what he knows to his principal, may be repelled by showing that, whilst he was acting as agent, he was also acting in another character, viz., as a party to a scheme or design of fraud, and that the knowledge which he attained was attained by him in the latter character, and that therefore there is no ground on which you can presume that the duty of an agent was performed by the person who filled that double character. That I understand to be the principle of that class of cases" (h).

"Where motives exist in the mind of a solicitor or agent sufficient with ordinary men to induce them to withhold information, the presumption that it will be communicated is rebutted" (i).

"The suppression of a material fact—the suppression of a thing done by a man in direct violation of his duty as a trustee—is an act which must relieve a defendant of all imputed knowledge of the transaction upon any theory of notice through a solicitor. I should have said this if there had not been abundant authorities to justify me in saying so. I take it to be very clearly established that if a person employed as a solicitor has done things which if disclosed

(g) *Waldy v. Gray*, L. R. 20 Eq. 251.

(h) *Kettlewell v. Watson*, 21 Chy. D. at 707.

(i) Per V. C. Spragge, in *Cameron v. Hutchinson*, 16 Gr. at 532.

would prevent the perfection of the security on which he is engaged, which would show that a good title does not exist to that which he is the instrument of conveying to the purchaser, it is not to be expected or inferred that he would communicate what he has done to his client" (j).

With regard to the doctrine of *Kennedy v. Green*, this point must be borne in mind, that the fraud on the part of the trustee or other agent, which will be sufficient to rebut the ordinary presumption that he communicated to his principal all material facts within his knowledge, must be a fraud apart from the mere non-disclosure by the agent of that which he knew and ought to have communicated (k).

There is a conflict of judicial opinion upon the question whether the fraud of the agent which will be sufficient to rebut the presumption of communication thereof to his principal, must of necessity be a fraud against that principal, or whether it will be sufficient if the fraud is directed against some third person, but is of such a nature that its disclosure to the principal would prevent the principal from effectually completing the transaction with regard to which the agency exists.

Lord Hatherley, L.C., lays it down that "It must be made out that distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client *in order to defraud him* (l).

On the other hand the extracts from the judgments in *Waldy v. Gray* and *Cameron v. Hutchison*, which are given above, show that the doctrine was therein stated broadly enough to include the case of the fraud in question being directed against third persons and not against the principal. In *Cameron v. Hutchison*, the fraud which the solicitor was attempting to perpetrate, was a fraud upon his creditors and not upon his client, yet the doctrine of *Kennedy v.*

(j) Per Bacon, V.-C., in *Waldy v. Gray*, L. R. 20 Eq. at 252.

(k) *Hewitt v. Loosemore*, 9 Hare 456; *Atterbury v. Wallis*, 8 De G. M. & G. at 466; *Waldy v. Gray*, L. R. 20 Eq. at 251 & 252; *Rolland v. Hart*, L. R. 6 Chy. App. at 262.

(l) *Rolland v. Hart*, L. R. 6 Chy. App. at 683; See *Boursot v. Savage*, L. R. 2 Eq. at 142, which would appear to have been decided upon this ground; See *Atterbury v. Wallis*, 8 De G. M. & G. 454 and *Cave v. Cave*, 15 Chy. D. at 644.

*Green* was held to apply. In *Waldy v. Gray*, as we have seen, Vice-Chancellor Bacon says (m):—"I take it to be very clearly established that if a person employed as a solicitor has done things which if disclosed would prevent the perfection of the security on which he is engaged, which would show that a good title does not exist to that which he is the instrument of conveying to the purchaser, it is not to be expected or inferred that he would communicate what he has done to his client." Moreover the case of *Kennedy v. Green* itself was a case where the fraud of the solicitor was directed against a third person and not against his immediate client (n).

A. H. MARSH.

(m) L. R. 20 Eq. at 252.

(n) For a concise statement of the facts of that case upon this point see 1 Ph. at 256; See also *Ex. p. Oriental Commercial Bank*, L. R. 5 Chy. App. 358 where the doctrine of *Kennedy v. Green* was applied, although the fraud of the agent was directed against a third person and not against his immediate principal.

(To be concluded.)

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## CONVEYANCES BY MARRIED WOMEN; DEFECTIVE CERTIFICATES.

Before the 29th March, 1873, a married woman could not make a valid conveyance of her land unless she was examined before a Judge, Magistrate or Notary Public as to her consent to convey without any coercion on the part of her husband (a). A certificate of the examination and her willingness to convey was required to be endorsed upon the conveyance; and so strict were the requirements of the law that an informality or irregularity in carrying them out rendered the whole conveyance void. From time to time various statutes were passed respecting the conveyance of land by married women (b), but the necessity for their separate examination remained until the 29th March, 1873, when an Act was passed declaring that every conveyance theretofore executed by a married woman of or affecting her real estate, in which her husband had joined, should be taken and adjudged to be valid and effectual to pass the estate of the married woman professed to be passed by the conveyance, notwithstanding the want of a certificate, and notwithstanding any irregularity, informality, or defect in the certificate, and notwithstanding that such conveyance might not have been executed, acknowledged or certified as required by any Act then or theretofore in force (c).

The result of this Act was to make valid all conveyances by married women which before the Act were void for want of the proper certificates or for any informality therein, except in certain cases. The exceptions are contained in the thirteenth section, and may be stated as follows:—1. When a valid deed has been made by the married woman

(a) This remark does not apply to separate estate.

(b) See them collected in *Elliott v. Brown*, 2 Ont. R. 356.

(c) 36 Vict. cap. 18, sec. 12; R. S. O. cap. 127, sec. 13.



after the void conveyance and before the 29th March, 1873. In this case the void deed is not cured unless the grantee in the void deed or some one claiming under him had been in the actual possession or enjoyment of the land continuously for three years subsequent to the deed and before 29th March, 1873, and was on that date in the actual possession or enjoyment thereof. 2. When the void deed was not executed in good faith. 3. When the married woman or those claiming under her, was or were in the actual possession or enjoyment of the land contrary to the terms of the conveyance on 29th March, 1873.

With respect to the second exception but little need be said. The statute would probably have been held not to extend to the case of a conveyance executed *mala fide*, even if the case had not been expressly excepted.

A purchaser should be careful to enquire, whenever he meets with a conveyance made by a married woman before 29th March, 1873, whether it falls within either the first or third exception. If it does, he must observe whether the requirements of the law in force at the time of its execution were strictly complied with; and if he finds that they have not, then the deed must be rejected as void.

A good deal of discussion took place in *Elliott v. Brown* (d) as to the meaning of the expression "actual possession and enjoyment contrary to the terms of such conveyance." In that case the plaintiff claimed the east half of a lot through a defective conveyance executed by a married woman who owned the whole lot. After the conveyance, in 1866, her two sons went into actual possession of the west half upon the understanding that they were to have the whole lot; they paid the married woman fifty dollars therefor, but no conveyance was made to them until after the Act was passed. The sons resided on the west half at the time the Act was passed, but had been, and then were, in the habit of making frequent incursions into the east half of the lot and cutting timber thereon; and they paid taxes on the whole lot. An attempt had been

(d) 2 Ont. R. 352; 11 App. R. 228.

made by the plaintiff to exercise acts of ownership on the east half before the statute, but his right had been disputed and in consequence he had desisted. In the Queen's Bench Division it was held, Cameron, J., dissenting, that the possession or enjoyment of the married woman or those claiming under her which was necessary to prevent the operation of the statute must have been that sort of possession which would, under the Statute of Limitations, have extinguished the paper title. In the Court of Appeal this decision was reversed, Osler, J.A., dissenting. It was there held that open and notorious acts of ownership in assertion of the right to possession under the legal title were sufficient to prevent the operation of the statute. This result is unfortunate, as it throws upon the conveyancer the very grave responsibility of adjudicating upon evidence of enjoyment which must ever be of a most unsatisfactory nature while the statute is satisfied by anything short of that open, visible and notorious possession, or enjoyment equivalent thereto, which amounts to exclusion of any other claimant. It is quite possible for acts of ownership to be openly exercised by both parties, neither being able to exclude the other, and each asserting a right to the enjoyment of the land; and in a conflict between the grantee under a void conveyance and the married woman, if the acts of ownership by the latter are to be referred to a rightful title and to be considered as contrary to the terms of the void conveyance, the statute will not operate to validate the conveyance though the enjoyment by the married woman has not been greater in degree than that of the grantee.

In cases within the first exception the Legislature recognizes the fact that the grantee in a subsequent valid conveyance is in constructive possession of the land under his legal title; and in order to validate the prior defective conveyance there must have been actual continuous possession or enjoyment for three years immediately prior to the passing of the Act. In cases within the third exception, the Legislature does not regard the married woman as in such constructive possession that there must have been actual possession in her grantee to avoid her title, but

requires of the married woman or those claiming under her actual possession or enjoyment as against the grantee.

Thus the symmetry of the Act requires, and the intention of the Legislature appears to be, that the grantee under the defective conveyance should be considered as so constructively in possession that actual possession, or its equivalent in actual enjoyment, is required to oust him. If that be so, then the actual possession or enjoyment under the third exception must necessarily be the same kind of possession or enjoyment as is required under the first exception.

It is true that the first exception speaks of continuous possession or enjoyment; but this refers to the time rather than to the mode of enjoyment. The three years must have been three consecutive years preceding the Act. In the third exception the married woman might have enjoyed the land at different times before the Act, but the strict reading does not require more of her than that she should have been in actual possession or enjoyment at the time of the passing of the Act. To permit any single act of enjoyment previous to the Act to be constructively extended to the time of the passing of the Act seems to be strangely at variance with its declaration that there must have been actual and not constructive possession, or actual and not constructive enjoyment, on the day on which it came into force.

This leads to another consideration at variance with the principle of *Elliott v. Brown*. The statute provides two alternatives, actual possession or actual enjoyment. If it is necessary in any case to establish actual possession by the married woman it will not suffice to prove constructive possession. Hence, when the married woman, or any one claiming under her, relies upon actual possession, it will not be sufficient to establish in evidence isolated acts of ownership, even though they are contrary to the terms of the deed. Because such acts of ownership may be exercised concurrently with similar acts of ownership by the grantee; and in such a case she is not in actual possession unless

each individual act of ownership is constructively extended beyond its actual duration in order to make her successive possessory acts equivalent to actual possession. If successive isolated possessory acts are equivalent to ouster of her grantee, then similar acts on the part of the grantee must in turn amount to ouster of the married woman; and unless she has at the time of the passing of the Act physical possession of the land she cannot, where such a state of facts occurs, be deemed to be in possession within the meaning of the Act. To say that she is constructively in possession by virtue of her paper title, and that isolated acts of ownership may be so constructively extended, is against the spirit of the act which retrospectively declares the void deed *to have passed* the estate to her grantee, regards the grantee, therefore, as having been in constructive possession, and requires actual possession, which must mean exclusive possession amounting to ouster of her grantee, in order to prevent the operation of her deed. This is strikingly in contrast with the first exception in the statute, where the void deed and a subsequent valid deed are in competition, the grantee in the void deed being required to establish three years' actual possession as against the constructive possession of the grantee claiming under the valid deed. Where the conflict is between the grantee and the married woman, possession need not have been taken by the grantee at all, but actual possession must have been had by the married woman at the time the Act was passed. If we admit any possessory acts short of continuous possession by the married woman to satisfy the statute, simply because they are contrary to the terms of her deed, then the principle being admitted, the evidence tends only to show the degree in which ownership has been exercised. And it will suffice upon this reasoning to show one individual act of ownership contrary to the terms of her deed, which being constructively extended beyond its actual duration puts the married woman constructively in possession at the time of the passing of the Act and so prevents its operation. This, it is submitted, was not the intention of the legislature when

it expressly provided for actual possession by the married woman or those claiming under her at the date of its enactment. It is therefore submitted that if actual possession is relied upon it must be that continuous, physical, open and notorious possession which amounts to ouster of the person claiming under the defective conveyance.

But the statute provides another alternative. Actual enjoyment of the land by the married woman at the date of the passing of the Act will be sufficient to prevent its operation. This actual enjoyment must be the equivalent of actual possession. The assumption that any enjoyment less than the equivalent of actual possession will suffice is illogical; for actual possession is only a high degree of actual enjoyment, and the alternatives of the statute are upon this hypothesis a greater or less degree of enjoyment. If then any enjoyment of the land not equivalent to actual possession will satisfy the statute, it will always be sufficient to give evidence of such enjoyment, and consequently it will never be necessary to give evidence of actual possession or its equivalent. In other words, it will never be necessary to give evidence of the greater degree of enjoyment, when evidence of a less degree will suffice. Therefore the provision of the statute that actual possession shall prevent its operation is entirely superfluous, and we must regard the legislature as having provided for a quantum of proof which was never intended to be given.

Again, if the evidence of actual enjoyment amounts to what may otherwise be called constructive possession, then it is not sufficient, for the statute requires that if possession is relied upon, it must be actual possession. And if, when actual enjoyment is relied upon, a succession of isolated possessory acts is shown, the statute is still not satisfied, because it requires a greater degree of possession, namely, actual possession, which as we have seen, must mean physical exclusive possession.

It may be truly said that actual enjoyment must always be something less than actual possession; and no doubt it

is difficult to say what actual enjoyment there can be which would be the equivalent of, without being in fact, actual possession. But it is not impossible to imagine such enjoyment. For instance, if a dam were built upon a stream below the land, so as to force back the water and cause it to overflow the land, there would be actual and continuous enjoyment of the land equivalent to, without in fact being, actual pedal possession, and no doubt other modes of enjoyment might be suggested.

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## EDITORIAL REVIEW.

**Professional Discipline.**

It was recently suggested that the Act enabling the Law Society to deal with professional misconduct should be amended so as to enable the society to compel the attendance of witnesses and to take evidence upon oath. There is no doubt that in the absence of power to compel the attendance of witnesses the society must necessarily be unable to make a proper investigation; for while a complainant may very readily give his own evidence and that of his friends, the solicitor may be entirely unable to adduce the necessary evidence to refute the charge if the facts are not within his own knowledge; and when they are entirely within his own knowledge, which will always be the case when a solicitor does not tattle and talk about his clients' affairs, his sole and unsupported word of honour is his only defence. There is no power either to enforce an answer to a question; and the complainant in consequence is able to tell just as much as he pleases and no more.

There is a still more serious defect in the existing Act (44 Vict. cap. 17) which is apparent on its face. The Benchers are empowered to disbar a barrister and to resolve that any solicitor is unworthy to practise. Upon disbarment all rights and privileges of a barrister cease. And upon a resolution that a solicitor is unworthy to practice being communicated to the Superior Courts "without any formal motion, an order of the said respective Courts may be drawn up, striking such attorney or solicitor off the rolls; provided that such attorney or solicitor may at any time afterwards apply to any of the said Courts to be restored to practice; as heretofore." Hence the only way in which the Benchers can exercise their jurisdiction is to disbar or practically strike off a solicitor. It is true that in several cases members of the profession have been

“censured,” but there being no statutory power thus to give vent to their displeasure, it is not considered to amount to more than an expression of individual opinion collectively given by the members of convocation, and the punishment is borne with great resignation.

It is manifest then that the powers given by the Act fall very far short of answering the purpose for which they were intended. None but the gravest offences can be dealt with, and yet in the gravest cases the profession have need of the greatest safeguards. The Act as it stands affords no protection whatever to a barrister, not even the right of appeal. Any vicious, malicious, disappointed client or opponent may stir up a charge, and when it is noised abroad with it will come every cause of complaint that any one ever heard of, supported only by the bald statements of people who imagine that they have been injured and are always gratified to see a privileged person damaged in some way. Against such attacks as these a barrister is practically defenceless. He has to depend largely on his reputation in the profession and the unlikelihood of the truth of the charges.

That being so it is not to be expected of a member of the Profession that he will cheerfully submit to an inquisition. He cannot appeal from the decision of the Benchers, and so his only course is to catch them tripping and prohibit them when they exceed their jurisdiction or proceed so irregularly or against justice to such an extent as to induce the Court to hold that they have no jurisdiction. A Solicitor is not even accorded the privilege of showing cause to a resolution to strike him off, for the order may be drawn up on *præcipe* by the proper officer upon receiving the resolution of convocation.

As the rules of convocation at present stand the Benchers have themselves provided for exceeding their jurisdiction upon every inquiry. Acting upon the authority of the statute in question they have passed the following rule:—

“Whenever any complaint shall be made to the Law Society, charging any barrister, solicitor, student or articulated clerk with misconduct as defined by the Act, 44



Vict. cap. 17, entitled an Act to extend the powers of the Law Society of Upper Canada, such complaint shall be reduced to writing, and shall be submitted to convocation at its next meeting, and in case convocation shall be of opinion that a *prima facie* case has been shown, the matter shall be sent to the Discipline Committee for investigation and the said Committee shall thereupon send a copy of the complaint to the party complained of, and shall notify in writing the complainant and party against whom the complaint has been made, of the time and place appointed for such investigation; and the said Committee shall, at the time and place appointed, proceed with the investigation and shall reduce to writing the statements made and evidence adduced by the parties, or of such of them as shall appear pursuant to such notice, and shall submit the same together with all books and papers relating to the matter *with their views thereon*, to convocation, who shall take such action thereon as to convocation as shall seem just and meet, provided that no barrister shall be disbarred, nor attorney deprived of his certificate, *without a two-thirds majority of benchers then present in convocation, which shall consist of not less than fifteen members.*

Those parts which we have italicized appear to be *ultra vires*. The Discipline Committee, to whom these matters are usually referred, have no jurisdiction to express any opinion or make any report. They may express their individual opinions; but they have no right to prejudge any case by a formal report, inasmuch as the Act provides that the accused must be "found by the Benchers of the Law Society, after due inquiry by a committee of their number or otherwise, guilty of professional misconduct."

It has been the practice for the Discipline Committee to make a report; and no doubt in many cases where the resolution has been to censure the accused, the members of convocation have been quite content to accept the report. But it does not appear to be a correct practice.

Then as to the quorum. There is no power given by the Act to fix upon any number as a quorum, or any numerical vote as sufficient. There are thirty elective, and say ten

*ex officio* Benchers. A two-thirds vote of a quorum of fifteen, would result in disbarment by the fiat of ten out of about forty Benchers—a most unjust result. And it may be seriously argued that a barrister is entitled to have a majority against him of all the Benchers. It may be said that convocation would be powerless upon that hypothesis, for a majority rarely attend. But the negligence of the Benchers ought not to lessen a man's rights,

The facts that a solicitor may be struck off upon the resolution of the Benchers, and that there is a proviso that application may be made to the Court to restore the solicitor to practice, seem to indicate very strongly that the proceedings by the Benchers should not transgress any of the rules which have been from time to time laid down by the Courts for the protection of the profession, e. g., that they will not call on a solicitor to show cause when the offence charged is a criminal offence; that no one but a client has a *locus standi* unless the Court has judicially obtained knowledge of the misconduct; and yet the powers of the society are not expressly limited. That they should be so limited seems clear; for if a contrary opinion were entertained, it would no longer be a question of jurisdiction, but one of discretion. Thus a solicitor would be at a greater disadvantage before his professional brothers than upon an application to the Court.

Taken as a whole, the Act must be pronounced most unsatisfactory. It gives either too much or too little power to the society; and it affords no protection whatever to the profession. As it stands, there is the greatest inducement to harass a solicitor by the process if the complainant is averse to stating his charge upon oath, or if he desires to avoid the consequences of compulsory attendance of witnesses. It may be said that convocation, consisting as it does of the leaders of the profession, may well be trusted. So they may, though they are men of like passions with ourselves; but in that it is, so we say, thank you for nothing, we had the protection of the Judges before.

To amend the Act upon its present lines seems to be out of the question; and it is pertinent here to say that a similar bill was recently rejected in the State of New York.

Not to be accused of destructive criticism, we propose that the Act should be repealed; and that in its place there should be passed an Act authorizing the Society to make an enquiry in every case in which a complaint is brought before them; and then, if it appears that there is good *prima facie* ground shown for an enquiry, that they should instruct their solicitor to institute on behalf of the Society the usual proceedings in open Court. There are many cases no doubt in which clients would be glad enough to shift the responsibility and expense of such proceedings upon the Society, but such matters could easily be provided against. That some such power as we suggest should be lodged in the Society is necessary, for there may be cases in which a client has neither the inclination nor the money to proceed when it would be for the advantage both of the profession and the public that proceedings should be taken.

It is remarkable that while power is given to the Court to restore a solicitor, nothing is said as to restoring a barrister to his former position.

#### **Unprofessional Advertising.**

A unique method of placing before the public the merits of a firm of practising solicitors is that recently adopted by two gentlemen who we thought were beyond suspicion of any thing of the kind. The card is neat in design, the typography is creditable, and the general appearance is not at all calculated to arouse suspicion until it is brought within critical distance. It is in the form of a calendar for the year 1887, and so, in addition to its insinuating modesty, it has the credit of being endowed (or intended to be endowed) with good staying qualities. Every time you look at the day of the month you are reminded that Messrs. Blank and Blank have large amounts of money to be lent upon "gilt-edged" loans, and are otherwise reminded that they possess qualifications which ought not to be kept secret.

As their object is publicity, we propose to frustrate them by positively refusing to mention their names unless specially requested. On looking at the act respecting discipline we notice that it gives the Benchers jurisdiction only in cases of "professional misconduct," and not in cases of unprofessional conduct.

A still more insinuating, but quite as effectual a way of bringing yourself into notice when all others fail, is to be appointed agent at Toronto for a country solicitor and then to write letters to other members of the profession in Toronto, and request them to take notice of it and act accordingly.

### **The Statutes.**

It is not creditable that the statutes passed by both the Dominion and Provincial Legislatures are not accessible in proper form for many months after they are passed. The Profession protect themselves as best they can by buying the extra numbers of the *Gazette* containing some of the statutes; but it is most unfair that they should have to resort to this expedient. No doubt it is a source of great profit to the printer, and the precedent once established would be difficult to dispose of. But common decency and justice require that the authentic edition of the statutes should be accessible to every one within a week or two after the statutes become law. Assuming that the bills are set up in type in the form in which they are ultimately to appear, there is no sound reason why they should not be in the forms and in a position to be put on the press on the day on which they are assented to. If they are not so set up, it is a most extraordinary thing, and should be remedied at once. There is no real ground for delay except that the index has to be compiled, and this could be done in an afternoon by any one whose hands and feet were not bound by red tape.

The Attorney-General, who is always ready to enter into and promote any reform, however insignificant, should give this matter his attention. The Dominion statutes are not

so often consulted as those of the Province, but there is no reason why they should not be worked off as rapidly as the *Gazette* is printed.

#### Revision of Rules.

The minutes of the meetings of the Joint Committee of the Law Associations which have been distributed in printed form show that the draft scheme which was sent to a great number of the Profession has been favourably considered both by the Judges and the Attorney-General.

At the last meeting of the Committee there was a great falling off in numbers. While it is no doubt burdensome for gentlemen to come to Toronto at their own expense, it should be borne in mind that they are perhaps the most deeply interested in the revision. Many useful suggestions have been made by outsiders, and their presence is heartily endorsed by the Toronto members.

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## REVIEW OF EXCHANGES.

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*American Law Review.*—January-February, 1887.

**Jurisdiction over estates of Insane Persons**, by J. G. WOERNER. A review of the statutory jurisdiction of Probate Courts.

**Changes in Public Corporations affecting Property and Rights of Creditors**, by FRANK C. HADDOCK. A great many cases are cited, showing the status of municipal and quasi-municipal corporations, the mode of dealing with them by legislative authority and the adjustment of their liabilities upon dissolution, division, annexation or consolidation.

**Strikes and Boycotts as Indictable Conspiracies at Common Law**, by CLIFFORD BRIGHAM. Mr. Justice Stephen's work on the History of the Criminal Law is largely drawn upon for the history of the law as to combinations of workmen and masters, and Wright on Criminal Conspiracy is also referred to. The result of all the authorities is concisely stated by Mr. Justice Stephen in a paragraph quoted by the learned writer, the effect of which may be stated as follows : at first there was no law ; then an opinion grows up that such combinations are indictable at common law. Then follow certain statutes from which it may be inferred that conspiracies were unlawful at common law, as being in restraint of trade. This is subsequently repealed. Finally, a recent statute protects all combinations in contemplation and furtherance of trade disputes, and provides that no agreement shall be treated as an indictable conspiracy unless the act agreed upon would be criminal, if done by a single person. American cases are also cited.

**An Attorney's special Lien upon Judgment**, by LEONARD A. JONES. The subject, continued from Vol. 20, p. 847, is considered under the following heads : when the attorney is required to give notice of his lien to the judgment debtor ; whether the attorney's lien is subject to a right of set off in the judgment debtor ; effect of an assignment of the judgment to the attorney or to another ; an attorney's lien not defeated by attachment or by his client's bankruptcy, an attorney's lien on his client's land which is the subject-matter of the suit ; waiver ; an attorney's remedies for enforcing his lien.

*Central Law Journal.*—7th January, 1887.

**Irregular Indorsement by Third Person—Character of the Liability Assumed**, by H. CAMPBELL BLACK. If a person, not the maker or payee of a note, payable on time or on demand, endorses it in blank, before its delivery to the payee, and for the purpose of lending

faith and credit to the payee, what is the character of the liability he assumes? There are four views. The first is that he is a joint maker for he cannot be a first indorser as no one but the payee can occupy that position, nor can he occupy other relationships for obvious reasons. The second view is that he is a co-maker, but in the character of guarantor or surety. The third view is that he is a guarantor pure and simple, his liability is secondary, and he cannot be fixed except by proof that the remedies against the maker have been exhausted, and that he is not generally entitled to notice unless injury be shown to have resulted from the want of it. The fourth view is, that he is to be regarded as a second endorser. He is not in this view liable to the payee at all, nor to any subsequent holder for value, unless the payee complies with the implied conditions of his signature by writing his own name above that of the blank indorser.

**Crimes—their Jurisdiction as affected by County Lines.** by CROSBY JOHNSON. A number of cases are cited, based upon the theory that crimes are local and ought to be punished only by the state whose laws have been violated.

*Ibid.*—14th January, 1887.

**Judgment by default,** by CHARLES B. ELLIOTT. A number of American and some English cases are cited upon the effect of such a judgment and the mode of setting it aside.

*Ibid.*—21st January, 1887.

**An Abutter's rights in a street,** by RUSSEL H. CURTIS. An abutter has the right as one of the public to use the street. He has also a right of access to his property for the infringement of which he may recover damages. He has also the right of free access of light and air which he cannot be deprived of even by licensed works, such as an elevated railway, without compensation. He may recover for a nuisance affecting his land, and may enjoin acts in the street injurious to his abutting lot.

*Ibid.*—28th January, 1887.

**Duress,** by WM. M. ROCKEL. Duress is defined under the common law, the civil law and the California Code. Who may avail himself of duress is considered; the classes are shown, and criminal cases are treated of.

*Criminal Law Magazine*—January, 1887.

**The Boycott and its Methods,** by LESTER M. DORMAN. By allusion to the case of Boycott who was so severely let alone in Ireland, the learned writer defines the term which his name serves. The article is descriptive, but cites a few cases.

# THE CANADIAN LAW TIMES.

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JULY, 1887.

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## CONSTRUCTIVE OR IMPUTED NOTICE DERIVED THROUGH TRUSTEES, SOLICITORS OR OTHER AGENTS.

*(Concluded from last number.)*

*Evidence to rebut presumption of communication.*—The reported expressions of some of the Judges might lead to the belief that the presumption that a trustee or agent will communicate to his principal all material facts within his knowledge and connected with the agency, being a presumption of law, may be rebutted by direct evidence that such communication did not in fact take place. Thus in *Cameron v. Hutchison* (o), we find V.-C. Spragge saying :—“ Now in the case of a solicitor the doctrine of notice to the principal proceeds upon the presumption that the knowledge will be communicated, because it is the duty of the solicitor to communicate it ; in the case of a trustee it is presumed that he will give true information because it is his interest to do so. In both cases the rule proceeds upon presumption ; and it was only in accordance with a general principle, that presumptions may be rebutted, that Sir Richard Kindersley decided *Browne v. Savage* (p), and I gather from the language of Sir George Turner that he decided *Hewitt v. Loosemore* upon the same principle (q).” It is true

(o) 16 Gr. at 532.

(p) 9 Hare, 449 ; 4 Drew. 635.

(q) Cited with approval by V.-C. Blake, in *Monro v. Rudd*, 20 Gr. at 61.



that in *Cameron v. Hutchison* no direct evidence of non-communication was given to rebut the presumption of communication arising from the relation of the parties, but a person reading the above extract, and bearing in mind that "A presumption means a rule of law that Courts and Judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved (r)," might lead to the belief that the legal presumption, as to communication by an agent to his principal, may be rebutted by direct negative evidence. Such however is not the case, and some Judges seeking to emphasize this point have gone too far the other way, and have indicated that the presumption of communication in such cases is irrebuttable. Thus Lord Hatherley, L.C., says in *Rolland v. Hart* (s), "The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance because he was not told of it by his solicitor. It cannot be left to the possibility or the impossibility of the man who seeks to affect you with notice, being able to prove that your solicitor did his duty in communicating to you that which, according to the terms of your employment of him, was the very thing which you employed him to ascertain." Again, Mr. Justice Fry says in *Kettlewell v. Watson* (t), "The first question then which arises is, did the principal know of the charge? Then the next question is, was it the agent's duty to communicate that fact to the principal? If it was, the Court always holds that he did communicate it, not because, in many cases, he did in fact communicate it, but because, as I understand it, it would be too dangerous to inquire whether the communication was really made; it would open the door to perjury." The same learned Judge states the rule somewhat more accurately in *Bradley v. Riches* (u), where he says:—"If the circumstances of the case are such as in the ordinary course of business between solicitor and client they are, then the solici-

(r) Stephens Dig. of Ev. Art. 1.

(t) 21 Chy. D. at 705.

(s) L. R. 6 Chy. App. at 682.

(u) 9 Chy. D. at 195 &amp; 196.

tor must be assumed to have communicated the fact to his client, and the knowledge of the agent is, to use the language of Lord Chelmsford in *Espin v. Pemberton* (v), the imputed knowledge of the client. It appears to me to be clear that that presumption or imputation is a thing which the client cannot be allowed to rebut. If it could be rebutted, it was amply rebutted in *Le Neve v. Le Neve* (w). If it could be rebutted, the language of Lord Hatherley in *Rolland v. Hart* (x) could not be upheld."

It is submitted that all of these statements of the law must be qualified by the rider that although the presumption of communication cannot be rebutted by direct negative evidence, yet it may be rebutted by evidence showing the existence of such surrounding circumstances as will raise the counter presumption of non-communication. That this is the case is clearly shown by *Kennedy v. Green*, and all the cases of that class which have already been cited (y).

A mode of statement which, if not more accurate, is more consistent with the above quoted judicial expressions, is, that the presumption of communication is not raised until the relationship of the parties and all the surrounding circumstances have been put in evidence, and that, unless such relationship and such circumstances combined establish the propriety thereof, the presumption is never raised at all.

Lord Chancellor Chelmsford dealing with this question (z) says: "Imputed knowledge does not depend upon whether it is communicated or not, and therefore the presumption of non-communication does not seem to be the proper principle to apply. I would rather say that the commission of the fraud broke off the relationship of principal and agent, or was beyond the scope of the authority, and therefore it prevented the possibility of imputing the knowledge of the agent to his principal."

(v) 3 DeG. & J. 547.

(w) 3 Atk. 646.

(x) L. R. 6 Chy. App. 682.

(y) See also *Sharpe v. Foy*, L. R. 4 Chy. App. 35.

(z) *Espin v. Pemberton*, 3 DeG. & J. at 555.

*Other Limitations of the General Rule.*

It would seem that wherever an action is based upon the direct personal fraud of the defendant, such action cannot be sustained by proof of constructive notice to the defendant, of facts which, if actually known to him, would establish the fraud in question. In *Wilde v. Gibson* (a), Lord Chancellor Cottenham says: "The effect of constructive notice in cases where it is applicable, as in contests between equities of innocent parties, is sufficiently severe, and is only resorted to from the necessity of finding some ground for giving preference between equities otherwise equal; but this is the first time I ever knew it applied in support of imputation of direct personal fraud and misrepresentation. The two cannot exist together—there can be no direct personal fraud without intention, and there can be no intention without knowledge of the fact concealed or misrepresented; and if there be knowledge, the case of constructive notice cannot arise; it would be absorbed in the proof of knowledge." This was said in a case where a bill was filed by a purchaser of an estate against his vendor to set aside the purchase and the conveyance upon the ground of fraudulent concealment of a right of way over the estate which existed at the time of the sale, and it was held that in such a case proof of concealment by the vendor's agent is not sufficient, there must be proof of direct personal knowledge and concealment by the principal.

"Constructive notice is not *prima facie* evidence of actual knowledge of the fact; the presumption of notice when it arises at all being conclusive even against the truth of the fact; and therefore constructive notice is always insufficient to fix on a party actual knowledge as the groundwork of express fraud" (b). Therefore a purchaser for valuable consideration, without actual knowledge, will not be chargeable with constructive notice of a fraudulent intent on the part of his grantors to defraud the creditors of such grantor,

(a) 1 H. L. C. at 623.

(b) *Weidler v. Farmers' Bank of Lancaster*, 11 Serg. & Rawle at 139.

actual notice on the part of the purchaser being required in order to affect his title (c).

*Notice under the Registry Act.*

Before the enactment which is now embodied in R. S. O. cap. 111, sec. 81, it was held that constructive notice of an unregistered deed *which was capable of registration*, did not avail against a registered deed, and that enactment now provides that "No equitable lien, charge or interest affecting lands shall be deemed valid in any court in this Province, as against a registered instrument executed by the same party, his heirs or assigns," so that the same doctrine as to notice now applies whether the notice is in respect of a right which is either capable or incapable of registration, and actual notice of an unregistered equity or other right is therefore necessary to deprive a registered owner of the priority which he can otherwise claim under the Registry Act (e).

In *Bell v. Walker* (f), Vice-Chancellor Blake says : "From year to year the object of the Legislature has been to make the Registry Office the test of title. All those claims which make it dangerous to deal with land notwithstanding that the record in the office failed to disclose them are being swept away. It will not be a carrying out of the intention of the Act if in place of giving it the liberal construction which is the result of the natural meaning of the words used, we seek to limit their signification and narrow their meaning."

Finding it laid down that actual notice is necessary in order to deprive a registered owner of the benefit of the Registry Act, and further finding that notice to an agent is

(c) *Stearns v. Gage*, 79 N. Y. 102 and 108; *Farley v. Carpenter*, 27 Hun. 359. Both of these cases are based upon a New York Statute, but it apparently does no more than declare the common law. As opposed to the doctrine of these cases see *Singer v. Jacobs*, 11 Fed. Rep. 559; *Atwood v. Impeon*, 29 N. J. Eq. 150.

(d) *Moore v. Bank of B. N. A.*, 15 Gr. 308.

(e) As to the meaning of the clause "executed by the same party, his heirs or assigns," see *Grey v. Ball*, 23 Gr. at 394.

(f) 20 Gr. at 570.

usually classed as constructive notice to the principal, one might be misled into the belief that a registered owner of land would be protected by the Registry Act, notwithstanding the fact that before his purchase thereof his agent had notice of an unregistered incumbrance thereon. In this connection the remarks of Lord Chesterfield in *Espin v. Pemberton* (g), are applicable; he says: "The notice which a client is supposed to receive through his solicitor, is generally treated as constructive notice. I think it would tend very much to clearness in these cases, if it were classed under the head of actual notice. The notice which affects the principal through a solicitor does not depend upon whether it is communicated to him or not. If a person employs a solicitor, who either knows or has imparted to him in the course of his employment some fact which affects the transaction, the principal is bound by the fact, whether it is communicated to or concealed from him. Constructive notice, properly so-called, is the knowledge which the Courts impute to a person upon a presumption so strong of the existence of the knowledge, that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him upon further inquiry, or from his wilfully abstaining from inquiries, to avoid notice. I should therefore prefer calling the knowledge a person has, either by himself, or through his agent, actual knowledge; or, if it is necessary to make a distinction between the knowledge which a person possesses himself, and that which is known to his agent, the latter might be called imputed knowledge." However open to criticism this expression may be, it appears to be well settled that for the purposes of the Registry Act notice to a solicitor is actual notice to his client. In *Rolland v. Hart* (h), Lord Hatherley, L. C., says: "It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is part of his duty to inform himself, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has not notice of that which his agent has notice of. The pur-

(g) 3 DeG. &amp; J. at 554.

(h) L. R. 6 Chy. App. at 681-2.

chaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance because he was not told of it by his solicitor."

Similar doctrine has been enunciated by the Supreme Court of Canada (i) where Chief-Justice Ritchie says: "The policy of the Registration Acts is to free a purchaser from the imputation of constructive notice. *In the absence of actual notice therefore to the principal or his agent*, and of fraud, it has been held that a later registered deed will have priority over a prior unregistered charge, notwithstanding that the purchaser knew that the title deeds were not in the possession of the vendors, but were in the hands of certain other persons, but abstained from inquiry (j)."

*Only one Solicitor employed.*—Seeing that such important consequences flow from the employment of a solicitor, it is not strange that the question not infrequently arises whether or not the relationship of solicitor and client has been created. Any doubt upon this point usually arises from the fact that in some transactions between vendor and purchaser or between mortgagor and mortgagee only one solicitor is employed. Vice-Chancellor Turner dealing with this question in *Hewitt v. Loosemore* (k), says: "Where a mortgagor is himself a solicitor, and prepares the mortgage deed, the mortgagee employing no other solicitor, the mortgagor must be considered to be the agent or solicitor of the mortgagee in the transaction of the mortgage. The mortgagee in such cases trusts the mortgagor to discharge those duties which his own solicitor would discharge, if he thought proper to employ one; and it can make no difference that the mortgagor is not paid by the mortgagee, the very nature of the transaction being, that all the expenses are borne by the mortgagor." In *Kennedy v. Green* (l) it is intimated that when one solicitor is employed in a mortgage transaction he is to be considered as solicitor both for the mortgagor and the mortgagee, but Lord Campbell, L. C., on the other hand lays it down that it does not follow that

(i) *Ross v. Hunter*, 7 Sup. Ct. Rep. at 305.

(j) See same case, p. 321.

(k) 9 Hare at 455.

(l) 3 My. & K. 699.

if there is not a solicitor on each side, the solicitor who does act is the solicitor for both (m).

Lord Chelmsford, L. C., dissenting from the doctrine laid down in the above extract from *Hewitt v. Loosemore*, says : "I find it very difficult to accede to the proposition however high may be the authority from which it proceed, that where the mortgagor is himself a solicitor, and prepares the mortgage deed, the mortgagee employing no other solicitor, the mortgagor must be considered to be the agent or solicitor of the mortgagee in the transaction. I think that there ought to be some consent on the part of the mortgagee to constitute this relation between them. If the mortgagee is imprudent enough to intrust his interests to the mortgagor, being a solicitor, he may do so and take all the consequences. But he may not desire to have any solicitor, considering himself equal to his own protection ; and if he omit to communicate this to the mortgagor, who is preparing the mortgage deed, the omission seems scarcely sufficient to constitute the mortgagor his solicitor " (n).

*Some special cases.*—*The Commercial Bank of Canada v. Cooke* (o), was a case in which a bill was filed by a judgment creditor to set aside an ante-nuptial marriage settlement, made by a settlor upon a trustee for his daughter and the issue of the intended marriage, at a time when the settlor was in embarrassed circumstances, by reason whereof he hastened the said intended marriage, at the same time telling the trustee and the solicitor who prepared the settlement that his object in so doing was to prevent his property from being seized by his creditors. It was held that such notice to the trustee of the settlement and to the solicitor for the objects of the settlement, operated as constructive notice to such objects of the settlement and invalidated the settlement not only as against the wife but also as against the issue of the marriage.

*Le Neve v. Le Neve* (p), was a case where a registered ante-nuptial marriage settlement made by a man upon his

(m) *Perry v. Holl*, 2 DeG. F. & J. at 53.

(n) *Espin v. Pemberton*, 3 DeG. & J. at 554-5.

(o) 9 Gr. 524.

(p) 3 Atk. 646.



intended second wife and the issue of the marriage, was postponed to a prior unregistered settlement, made by the same settlor upon a former marriage, on the ground that the solicitor, who had, upon the recommendation of her intended husband, been employed by the second wife to prepare the second settlement, had actual knowledge of the existence of the first settlement.

In *Toulmin v. Steere* (q), it is laid down that infants may be affected with constructive notice derived through their agents, in the same manner as if they were adults.

In *Wise v. Wise* (r), the opinion is expressed by Lord Chancellor Sugden that actual notice to the trustee of a marriage settlement will operate as constructive notice to the unborn issue of the marriage who may thereafter come into existence, and that this is the case even though the trustee acquires such notice before he becomes such trustee.

These cases it is submitted, more than justify the statement that the doctrine as to constructive notice derived through agents has been extended to its utmost limits, and should in future be restricted rather than extended. The Courts have at times appeared to be unable to restrain their creature from working injustice, but a liberal application of the doctrine of *Kennedy v. Green*, will in most cases relieve them from that difficulty.

A. H. MARSH.

(q) 3 Mer. at 222-3.

(r) 2 J. & La. 403.

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## CONVEYANCES BY MARRIED WOMEN; JOINDER OF THE HUSBAND.

It is necessary in all cases in which a married woman conveys that her husband should join in the conveyance as a party (e) unless the property conveyed is her separate estate, either statutory or equitable, or unless his concurrence is dispensed with by order of a Judge. The husband should be a granting party, for the purpose of conveying his interest in the land (f). And it was held before *The Conveyancing and Law of Property Act, 1886*, that he could not accept a conveyance from his wife although he was a party thereto and executed it. His concurrence was necessary for her protection, and by becoming his wife's grantee he was placed in an adverse position to her, and so she had no protection from imposition or improvidence (g). But now a wife may convey freehold land direct to her husband, and a husband to his wife (h).

And it appears that a married woman whose husband is under imprisonment for felony may during his imprisonment convey as a *feme sole* (i).

The husband alone could convey his marital interest in the land of his wife (j); and where a conveyance of her property was made by a wife who was under twenty-one years of age, her husband joining, it was held sufficient to convey the husband's interest although void as to the wife's (k).

The consolidated statute respecting the property of married women (l) did not give to a married woman the right to dispose of her property without her husband's con-

(e) R. S. O. cap. 127, sec. 3; *Foster v. Beall*, 15 Gr. 246.

(f) *Doe dem. McDonald v. Twigg*, 5 U. C. R. 167.

(g) *Ogden v. McArthur*, 36 U. C. R. 246.

(h) 40 Vict. cap. 20, sec. 6.

(i) *Crocker v. Sowden*, 33 U. C. R. 397.

(j) *Allan v. Levesconte*, 15 U. C. R. 9.

(k) *Doran v. Reid*, 13 C. P. 393.

(l) C. S. U. C. cap. 73.

sent, nor did it affect his estate by the curtesy; and it was not intended to effect any change in the mode of conveyance by married women (*m*). The law remained thus until the 2nd of March, 1872. And therefore, as to all property acquired by a married woman during coverture, or owned by her at the time of her marriage, before that date, it was and still is necessary that the husband should join as a granting party in her conveyance.

*The Married Women's Property Act, 1872*, made a change in the law which upon the revision of the statutes in 1877 was restricted in its operation to women married after the 2nd March, 1872 (*n*). And so, as to women married on or before that date, who acquired property on or after the 31st of December, 1877 (the day on which the Revised Statutes came into force), it is necessary that their husbands should join them in conveying such property; for their position is the same as it was under the consolidated statute (*o*), though for a time (from 2nd March, 1872, to 31st December, 1877) they were emancipated, and could acquire and dispose of land as separate estate.

By *The Married Women's Real Estate Act* (*p*), except where the Court of Chancery (now the High Court of Justice), or any person intrusted with the commitment of a lunatic, idiot or person of unsound mind, is the protector of a settlement in lieu of her husband, if a husband is, in consequence of being a lunatic, idiot, or of unsound mind, or is, from any other cause, incapable of executing a deed, or if his residence is not known, or he is in prison, or is living apart from his wife by mutual consent, or if there is in the opinion of the Judge any other cause for so doing, a Judge may, on the application of the wife, upon such evidence as to him seems meet, and either *ex parte*, or upon such notice to the husband as he deems requisite, dispense with the concurrence of the husband, in any case in which his concurrence is required by the Act in his wife's con-

(*m*) *Emrick v. Sullivan*, 25 U. C. R. 105.

(*n*) R. S. O. cap. 125, sec. 4.

(*o*) R. S. O. cap. 125, sec. 3.

(*p*) R. S. O. cap. 127, sec. 4.

veyance; and the conveyance is as valid and effectual as if the husband had been a party. The application may be made to a Judge of the High Court or to a Judge of a County Court, or a Junior or Deputy Judge. The Referee in Chambers had not power to make such an order (q), and consequently the Master in Chambers has no jurisdiction. Provision is also made by the Act for registration of the order.

On 2nd March, 1872, there was passed *The Married Women's Property Act, 1872*, by which it was enacted that after the passing of the Act the real estate of any married woman, owned by her at the time of her marriage or acquired during coverture should, without prejudice, and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any estate or claim of her husband during her lifetime or as tenant by the curtesy (r).

The construction of this Act came up in *Furness v. Mitchell* (s), where it was held that land coming within its operation was separate estate in the fullest sense of the term; and consequently that there was attached to it the inseparable right of alienation without the husband's consent.

As to the application of the Act, it was there argued that the husband upon marriage acquired a prospective vested interest in all lands which his wife might acquire during the coverture, and consequently that the Act should be restricted to those women who were married after it was passed. But the Court held that it applied to women married before as well as after it came into force; that, as to property acquired before the Act, the husband had a vested interest in it which should not be affected by a retro-active application of the Act; but, as to property acquired after the Act was passed, the married woman took it as separate estate, and had therefore the power of conveying it as a *feme sole*. The law remained thus until the coming

(q) *Re Nolan*, 6 P. R. 115.

(r) 35 Vict. cap. 16, sec. 1.

(s) 3 App. R. 510.

into force of the Revised Statutes. During this period there was in force the Act respecting the conveyance of land by married women (*t*), which was amended in 1873 (*u*), and by these Acts it was declared that the joinder of the husband was necessary in order that the married woman might make a valid conveyance. But the opinion was expressed in *Furness v. Mitchell* that to give general effect to these Acts would be to completely nullify the effect of the Act respecting separate estate, by taking away from such property one of its essential characteristics, namely, the right to convey without the husband's consent; and therefore that the application of these Acts must be restricted to married women who were not within *The Married Women's Property Act, 1872*, that is to those who had acquired property before that Act was passed (*v*).

During the period then from 2nd March, 1872, to 30th December, 1877, all married women who acquired property between those dates, both inclusive, took the same as separate estate, and were therefore enabled to convey without the consent or concurrence of their husbands.

The Revised Statute made an important alteration in the application of this enactment; for, whereas the Act of 1872 applied to women married at any time, the Revised Statute restricts the operation of the clause in question to women married after 2nd March, 1872 (*w*). Hence, as to property acquired after the Revised Statutes came into force and before *The Married Women's Property Act, 1884*, if the marriage took place before 3rd March, 1872, the wife could not, and cannot now, convey without her husband's concurrence; if the marriage took place on or after that date the property became separate estate and subject to the married woman's disposal without her husband's consent (*x*).

When the Revised Statute came into force there must

(*t*) C. S. U. C. cap. 86, amended by 34 Vict. cap. 24.

(*u*) 36 Vict. cap. 18.

(*c*) *Furness v. Mitchell*, 3 App. R. 522.

(*w*) R. S. O. cap. 125, sec 4.

(*x*) *Bryson v. Ont. & Q. R. Co.*, 8 Ont. R. 380.

a large amount of land held by women who were before 3rd March, 1872, but who acquired the land while the Act of 1872 was in force. During this time the land was undoubtedly separate estate, and the question arose, on the coming into force of the Revised Statutes, whether it was divested of this character and brought subject to the third section of the Act, which is the effect as the Consolidated Statute. It was held in *Re Harrison (y)*, that a woman who was married in 1861 and acquired the land in question in July, 1872, was not to be sued by next friend in a suit brought in 1880 for recovery of the land, as it could not be deemed to be her separate estate. This decision cannot, however, be supported, for there is no doubt that the right of a married woman to hold and dispose of land as her separate estate is a legally vested right which should not lightly be interfered with; and the Revised Statutes were not intended to have retrospective operation so as to affect any title already acquired (*z*). A similar state of facts arose in *Re Smith (a)*, and it was there held that the married woman could convey apart from her husband. It is true that in that case, which was decided after the Act of 1884, it was argued that the latter Act gave her the power of disposing of any land which she had acquired before it came into force; but the decision cannot be supported on that ground, though it may well be supported on the ground that the land in question was separate estate when the Revised Statutes came into force, and that it retained that character notwithstanding the change made by the Act of 1884.

Hence, property acquired while the Act of 1872 was in force, and held at the time the Revised Statute came into force, retained its character of separate estate, and a married woman could still may, notwithstanding the Revised Statute, convey the land by the married woman without her husband's

*The Married Women's Property Act, 1884 (b)*, came into force on the 1st July, 1884, and repealed the Revised Statute respecting the property of married women, but provided that the repeal should not affect any act done or right acquired while the Act was in force, or any right or liability of any husband or wife married before the commencement of the Act, to sue or be sued under the provisions of the repealed Act, in respect of rights and liabilities which accrued before the commencement of the Act. It also repealed that part of the Revised Statute (c) which required the joinder of the husband in his wife's conveyance.

By the second section of this Act it is declared that "a married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of a trustee."

Section 3 declares that "every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, etc."

Section 5 declares that "every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, etc."

The effect of this legislation appears to be that the second section defines in general terms the rights and liabilities of such married women, and the nature and characteristics of such property, as are within the Act; while the third and fifth sections determine what married women and what property are within its scope.

(b) 47 Vict. cap. 19.

(c) R. S. O. cap. 127, sec. 3.

The effect of the second section is to make all property which is within the Act separate property, and consequently to enable the married women to dispose of it as a *feme sole* (d).

In *Re Coulter & Smith* (e) the Act appears to have been treated as retrospective; and the second section is certainly general enough in its terms to include all married women and all property of married women whenever acquired. And the repeal of that portion of the Revised Statute which required the concurrence of the husband in his wife's conveyance lends some sanction to this view; for the husband's concurrence was never necessary in the conveyance of his wife's separate estate, and the repeal of the enactment requiring his concurrence would have no real significance unless it was intended that where his consent was formerly necessary it should thereafter be unnecessary. The Act however saves all rights acquired before it was passed, and property previously acquired by a married woman which was not separate estate would necessarily be subject to the husband's marital rights which were evidently intended to be left undisturbed (f). That being so the husband's concurrence would still be necessary whenever the property to be conveyed is not separate estate.

Hence we may conclude that property the title to which accrued (g) to a married woman on or after 1st July, 1884, or property at the time of her marriage owned by a woman married on or after that date, is separate property and may be conveyed by her as a *feme sole*.

It being of the essence of separate estate that the wife should have the right to dispose of it without her husband's consent or concurrence, it follows that she may make a disposition in favour of her husband; and although before the Conveyancing Act of 1886, she could not convey directly to him, yet such a conveyance would be equitably construed

(d) See *Cooper v. Macdonald*, L. R. 7 Ch. D. at p. 293.

(e) 8 Ont. R. 536; but see ante, p. 46, as to this case.

(f) *Turnbull v. Forman*, L. R. 15 Q. B. D. 234; *Scott v. Wye*, 11 P. R. 93.

(g) *Baynton v. Collins*, L. R. 27 Ch. D. 604; *Re Thompson & Curzon*, L. R. 29 Ch. D. 177.

as a contract to convey to him by proper legal assurance, and she would thereby become a trustee for her husband (*h*).

*Summary.*

1. Property acquired by a married woman before 2nd March, 1872, became subject to her husband's marital rights, and his concurrence has always been and still is necessary in her conveyance.

2. Property acquired during the period from 2nd March, 1872, to 30th December, 1877, both inclusive, by a woman married at any time before 31st December, 1877, became separate estate, and the husband's concurrence was never necessary.

3. Property acquired while the Revised Statute was in force by a woman married before 3rd March, 1872, became subject to her husband's marital rights, and his concurrence was and still is necessary in her conveyance.

4. Property acquired while the Revised Statute was in force by a woman married after 2nd March, 1872, became separate estate, and the husband's concurrence was never necessary.

5. Property acquired on or after 1st July, 1884, by a woman married at any time, and property owned at the time of her marriage by a woman married on or after 1st July, 1884, is separate estate, and the husband's concurrence is unnecessary.

(*h*) *Sanders v. Malsburg*, 1 Ont. R. 178.



## EDITORIAL REVIEW.

**Revision of the Rules.**

The committee have made such substantial progress in the revision of the rules that they will report the following matters :

The prominent features of the revision are the classification of the rules ; the abolition of writs for the execution of extraordinary remedies ; the abolition of references to arbitration, the same object being secured by references to referees ; a permanent circuit list for the trial of all cases in the High Court with the necessary re-arrangement of the sittings of the Divisional Courts ; the re-distribution of offices in Toronto, so as to secure that all proceedings in an action from writ to judgment shall be in one office, viz. the records and writs office ; the amendment of the rules in such other respects as are necessary to secure uniformity of practice in all cases, and the exercise of jurisdiction by all the Judges of the High Court without regard to the Divisions to which they are attached or to the Division in which the actions are pending ; the abolition of all rules of practice not contained in the rules now under revision with a provision that decisions in matters not provided for by the rules shall be by analogy thereto and not to the former practice.

The minor features of the rules are the division into chapters, titles, and headings, following in a general way the published scheme ; the provision that no rule hereafter made shall be of any force until it is promulgated by publication ; the abolition of the office of judgment clerk and the giving to local and deputy registrars the same right to settle minutes of judgment as a registrar now has with the right to move to vary the minutes ; provision that all motions shall be set down, and all cause lists shall be pre-

pared in the registrars' office; making a clear distinction between defence and counter-claim; the reduction of the several modes of securing the attendance of a party or witness for examination or cross-examination before trial to one method, viz., by subpoena and appointment; extension of the right to cross-examine on an affidavit on production to all deponents instead of restricting it to officers of corporations; the abolition of orders *nisi* and summonses; provision that every judgment shall be drawn up, signed and entered as a decree formerly was.

In addition to the foregoing matters which have been embodied in draft rules, the committee will make the following suggestions :

1. That a rules committee consisting of the Chief Justices, the Chancellor, and the Attorney-General, or such of the Judges as may be chosen, should form a permanent rules committee, and that the sole power to make rules should be vested in the committee.

2. That some means should be devised to settle definitely before a case is called for trial, whether it is to be tried with or without a jury.

3. That appeals from masters, referees and arbitrators, should be to the Court direct.

4. That payment into Court by a defendant with his defence, should be simplified by requiring the money to remain in court subject to order, unless the plaintiff takes it out in satisfaction of the very cause of action or matter for which it was paid in.

5. That the order for delivery and taxation of a solicitor's bill should follow the old Chancery practice, according to which one order contained directions to deliver, tax, take accounts, and pay over balance.

6. That the revision of country taxations which by the present method is cumbersome and expensive, should either be abolished or placed upon a less expensive basis.

7. That some means of more rapidly obtaining copies of evidence should be devised than at present.

Many suggestions of a less important character appear in the draft books which have been prepared under the direc-

tion of the committee, and which they will place before the Judges.

With respect to the classification of the rules and their division into chapters, titles and headings, it has been suggested that their construction may thereby be affected. But some arrangement and division of the rules is absolutely necessary for convenience of reference, and it has never been urged that the division of the judicature rules into orders has affected their construction.

With respect to the power to abolish writs for the execution of extraordinary remedies, the Act 50 Vict. cap. 8, sec. 2, declares that "the Judges shall be deemed and construed to have under the Judicature Act, the same power of making Rules of Court in respect of and varying statutory enactments affecting practice and procedure, or matters in the nature of practice and procedure, as if the said enactments had been rules in the schedule to the Judicature Act, or had derived their authority from Rules of Court." The statutory enactments contain (i) a recognition or creation of rights, (ii) a remedy or relief for infringement of the rights, and (iii) a mode of practice or procedure for arriving at the remedy. It is thought, then, that as long as the rights and remedies are untouched, the Judges have full power to deal with the procedure in any way. For instance, the right of a creditor to arrest his debtor is not a right to a writ *qua* writ, but a substantive right to take his debtor's body by lawful process. Regarding the writ merely as the machinery for working out the principle of the Act respecting *capias*, there appears to be ample power in the Judges under the Act already cited to deal with it as they please, even to the extent of abolishing the process and substituting another species of machinery, namely, an order, for giving the creditor the same relief. So it is with attachment of the goods of absconding debtors, and *replevin*. There seems, therefore, to be no objection on the ground of want of power to the proposed change.

The provision of a permanent circuit list for all High Court cases, and the consequent re-arrangement of the Divisional Courts is desired by the whole profession. A

number of gentlemen from outer counties attended the committee meetings, and the expression of opinion in favour of this change was unanimous.

With respect to securing uniformity of practice in all the divisions gentlemen who attended the committee meetings could not be emphatic enough. They believe that the absolute fusion of procedure which was expected to follow on the introduction of the Judicature Act and rules was prevented by the mechanical arrangement of the divisions and divisional officers; and they are also of opinion that the concentration of all business relating to the progress of all actions in one office, together with the arrangements of the sittings for trials, during the week, and of Divisional Courts, will be the most important factor in that complete fusion of the practice which is so desirable.

The substitution of the notice of motion for order *nisi*, it is believed, will reduce the business before the Divisional Courts and also tend to hasten its despatch. Upon this change being made, in order to prepare a list for the Divisional Courts it will be necessary to adopt the practice which now prevails in the Chancery Division of setting down all motions before the first day of the sittings. The party against whom the motion is made should have fair warning of an intended motion, and to provide for this a rule has been drafted providing for seven days notice of motion. In order to prepare a list of cases to be argued, they should be set down before the first day, and to provide for this a rule has been adopted that they shall be set down two days before the sittings.

It is believed that much uncertainty has prevailed in the profession on account of the occasional reversion to former modes of practice, and it has therefore been thought desirable that the whole written practice should be contained in one body of rules. It may well be that many matters will thus be left unprovided for. But when such matters are discovered, it will secure the passing of a new rule immediately if a decision cannot be given by analogy to the rules as revised.

With respect to the promulgation of rules by publication before they come into force, it appears that there are many important rules of practice of a minor character, such as relate to setting down motions and other like matters, of which the majority of the profession are entirely ignorant. There is no official notice of the passing of rules, and the profession have to rely upon notice derived from reports in the newspapers and other sources for their information. It is also impossible in many cases to get copies of new rules for some days after they are passed. It has therefore been suggested that rules hereafter made should be published before coming into force.

It is most desirable that the entry of judgment should be made uniform. The most convenient method appears to be that at present adopted by the Chancery Division.

With respect to settling the manner of trial, though it is most desirable to have it fixed before trial, there are serious difficulties to be encountered. Any rule which would definitely fix the mode of trial before trial, would necessarily take away all discretion from the Judge at the trial. It appears to be the opinion of some of the Judges that this discretion should not be interfered with. It has also been remarked that the mode of trial should not be dictated to the Judge who is to try the case by a Judge or officer who is not to try it. These objections stand in the way of drawing a rule which would definitely fix the mode of trial before trial. It has been suggested that where a motion has been made to strike out a jury notice, the result of the motion should be final, and should bind the Judge who is to try the case. This, however, would encourage such motions, and would be open to the objections already urged. If the discretion of the Judge at the trial is not to be interfered with, then there seems to be no solution of the difficulty. A postponement of the trial at the request of either party when the trial Judge has determined the mode of trial, is open to the objection that the trial may come on before another Judge who may disagree with the former Judge as to the mode of trial. Perhaps upon no point except uniformity of practice were opinions so strongly

and vigorously expressed as upon this. A change is not only desirable but necessary, and as the only solution of the difficulty is to take away the absolute discretion of the trial Judge, a very strong recommendation to that effect will be made.

As to appeals from the reports of masters, referees and arbitrators, there is no advantage gained by bringing them on in Chambers. In the case of appeals from referees and arbitrators it is desirable that they should come before the Court in the first instance, inasmuch as the proposition contained in the draft rules empowers judgment to be granted immediately upon such reports and awards if the appeal is unsuccessful. For the sake of uniformity appeals from Master's Reports might be treated likewise. The only advantage derived from bringing them on in Chambers was that the unsuccessful party used to escape payment of a larger fee than \$10. But as there is now no limit to the fiat granting power of the Master in Chambers, the allowance of a reasonable fee is only transferred in county cases from the taxing officer to the Master in Chambers.

It is also suggested that appeals under the Quieting Titles Act should come on in Court, as most important questions of law are generally involved.

#### **The late Sir M. C. Cameron.**

By the death after a short illness of the Chief Justice of the Common Pleas, the Province has sustained a severe loss.

Sir Matthew Cameron possessed such marked individuality of character, that he stood out strongly in relief amongst his fellow-men. In private life, as an advocate, as a statesman, and as a Judge, he was a distinguished man.

In his private life he displayed the greatest heroism in passing through many severe trials. Affectionate in his family, upright in his conduct, and hospitable to a fault, he earned the affection and respect of every one who had the good fortune to know him.

As an advocate he distinguished himself at the Common Law Bar. He displayed great skill and strength before a jury, and had the rare faculty of making men believe him to be in earnest. A story is told of Sir James Scarlett, who was frequently opposed by Brougham when at the Bar. A juryman was heard saying as he left the Court room, "that fellow Brougham is a rare clever man, but you see, Scarlett, he's always on the right side." It is said that Scarlett considered this the greatest compliment ever paid to him as an advocate. Such a faculty, though perhaps in a less degree, Sir Matthew Cameron possessed. And not only with juries but with political opponents in his speeches on the hustings, he contrived to gain their sympathies and secure attention to what he said.

As a statesman he was one of the very few absolutely blameless men who have mingled in politics. There has never been the slightest imputation beyond error of judgment cast upon his name. And so punctilious was he in public life that he would neither ask for a vote nor allow any one to do so for him. He relied solely upon the effect of public addresses to his constituents and a blameless record in public and private life.

As a Judge he for some time retained the advocate's cast of mind. Whether from habit or with a desire to test the strength of an argument, he occasionally put the Bar to severe trials of strength. And his Common Law training tended to make him somewhat technical in his views. His probity and impartiality were proverbial, but it must be confessed that he lacked those liberal views which the present system of jurisprudence, pervaded with equity as it is, now exacts from a Judge.

His painstaking and conscientious application to work no doubt hastened his death. He never spared himself, and when illness came upon him he had not the strength to fight it.

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# THE CANADIAN LAW TIMES.

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AUGUST, 1887.

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## ONTARIO LEGISLATION, 1887.

THE statute book for this year is noticeable chiefly for the numerous amendments of the law which are rendered necessary and expedient by the revision of the statutes which is now proceeding at the hands of the Commission appointed for that purpose, although other important legislation is also to be noticed. Under the equivocal title "The Act for further improving the Law," we find the amending Act, which is given in the first section the nickname, "The Statute Amendment Act, 1887."

*Registration of instruments.*—By section thirteen of the Act provision is made for the registration in full of instruments which, before the first of January, 1886, were registered by memorial. There is an obvious misprint of 1886 for 1866, for which the Queen's Printer is responsible. It is declared that instruments so registered may be registered at full length in the same or any other registry division, by the production of the original instrument bearing a certificate of previous registration by memorial and the deposit of a copy thereof with an affidavit verifying the copy. The whole instrument is to be copied at length, including the former certificate of registration and the affidavit of verification. A certificate of the re-registration is to be endorsed on the original according to the form given in Schedule G to the Registry Act. The same carelessness in phraseology that is apparent in the Registry Act appears



again here. The Act declares that the instrument may be registered "by the production of the original and the deposit of a copy thereof with an affidavit verifying the copy." The same question may arise under this Act that arose under the Registry Act as to what constitutes registration. That Act declares that "all instruments . . . shall be registered at full length . . . upon and by delivery to the Registrar." As far as the party registering is concerned, all that he can do is done when he has delivered his deed to the Registrar and has received it from him with a certificate endorsed. Still the deed will not have been registered if the Registrar has not performed his duty in transcribing the document in the proper book, etc. And so it has been held that registration is not completed upon and by delivery to the Registrar, but only upon and by the regular performance of his duties by the Registrar (*a*). So in the Act under review, the strict reading of the clause would entitle one to suppose that the registration was complete upon delivery to the Registrar, but when read with the other clauses of the Registry Act of which this is an amendment, the same uncertainty as to what constitutes registration prevails.

But apart from this, the benefit to be derived from the new enactment is not quite apparent, nor is it quite clear what use may be made of the registration in a strictly legal sense. Nothing is said as to priority of registration, nor as to the effect of the second certificate as evidence of registration or execution.

The production of these deeds themselves in actions of ejectment is not necessarily evidence of their execution, as many of them are under the required age. The certificate endorsed is not evidence of the execution, because the Registry Act applies only to deeds executed in duplicate. And the copy certainly is of no greater value as secondary evidence on account of its registration than if it had never been deposited with the Registrar. The Registrar is not even required to endorse a certificate upon it. One is

(*a*) See 5 C. L. T. 252.

forced to the conclusion that the registration *qua* registration amounts to nothing. It evidently was not intended that as regards registration it should date from the re-registration, and so its whole validity, as far as registration is concerned, must depend upon the previous registration by memorial.

As between vendor and purchaser it will still be necessary, we presume, to produce the original instrument, and furnish a copy, or account for its absence (b). If the original is not in the possession, custody or power of the vendor, the registered memorial is sufficient evidence, if it is twenty years old and is executed by the grantor, except so far as it is proved to be inaccurate; and it is presumed to contain all the material contents of the instrument to which it relates. No doubt it is a great convenience to a vendor to be able to rely upon the registered memorial in such a case. It is, however, notorious that memorials do not contain all the material contents of the instruments to which they relate; and the registration of the instrument would immediately disclose this and destroy the effect of the memorial as evidence. If the original deed after registration passes out of the custody or power of a vendor he will not be able to use the memorial as evidence unless it agrees with the copy of the original deposited with the Registrar. It may be said that if the latter is not evidence it cannot be used to show that the memorial does not contain the material contents of the deed. But if that is so, then the re-registration is of no use. If it can be so used, then the memorial is useless to prove the contents of the deed except to a limited extent, and the copy of the original is not evidence.

*Property of married women.*—The Statutes move us in sundry places to acknowledge and confess that we know but little of the status of a married woman with respect to her land and the conveyance thereof. From time to time various Acts have been passed having as their object the emancipation of married women from marital control

(b) *Re Charles*, 4 Ch. Ch. 19.

in the disposition of their property, and the rendering of them liable to the extent of their separate property on debts contracted. But instead of relieving doubts they only sink us deeper in the mire. Every movement renders it more difficult to escape from the slough into which modern legislation has driven us. This year we have amendments to the law which are no doubt well intended, but which only serve to increase doubts which years of patient study have tended somewhat to lighten. The points raised by sections twenty-one to twenty-five of the Act under review are legion.

The first point arises under section twenty-one, which declares that the Act of 1884 is not to be construed to deprive a woman married prior to the commencement of the Act "of any right or privilege which she had at the time of the commencement of the Act, or would afterwards have if that Act had not been passed." It would have been well to preface this with a preamble reciting the necessity for its enactment, for it is difficult to see what right (with the exception of one to be mentioned shortly) she could have been deprived of. The Act of 1884 is not restrictive. The married woman is thought to be better off under it than under former legislation. Why then should former rights and privileges be saved? If that were necessary, it seems already to have been done by the Act of 1884 itself, the twenty-second section of which provides that the repeal of former Acts "shall not affect any act done or right acquired while the said Act was in force, or any right or liability of any husband or wife married before the commencement of this Act to sue or be sued under the provisions of the said repealed Act, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act."

It is to be noted, however, that this proviso is restricted to the repeal of *The Married Women's Property Act*. The same section repeals that portion of *The Married Women's Real Estate Act* which requires the joinder of the husband in

a conveyance, but no rights or privileges are saved. One of a married woman's privileges under this Act was to procure a Judge's order allowing her to convey apart from her husband in certain cases. Whether the new enactment will preserve this right or not will be a question which must be viewed from the following standpoint. All property of married women may be generally divided into separate property and property subject to marital control. The effect of our legislation is to enable married women from time to time to acquire land as separate estate, and the statutes being retrospective with respect to the date of marriage in most cases, many married women who, before they were passed, held land subject to marital control were enabled thereafter to acquire land as separate estate, and so free from marital control. Generally speaking, separate estate may be conveyed without the joinder of the husband, but land not held as separate estate must be conveyed with the husband's consent. We may then roughly deduce as the result of the legislation that all property requires the joinder of the husband in its conveyance unless it falls within one of the married women's Acts and becomes separate estate. Hence the Act declaring the mode of conveyance by joinder of the husband, and allowing land to be conveyed without joining him under a Judge's order, applies only to land which is not separate estate. A very large amount of land is held by married women subject to marital control, and formerly subject to the provisions of the repealed Act as to mode of conveyance. The husbands were, and still are, entitled to the estate by the curtesy (assuming other conditions to be present), and must necessarily join in the conveyance to get rid of their own interests as well as to give potency to their wives' conveyances. What, then, became of this property on the repeal of the Act? No mode of conveyance is prescribed except that a married woman may convey as a *feme sole*. That, however, does not get rid of the husband's interest in the land. He must join as a conveying party to pass his estate or interest. The result probably is (for no one can speak with certainty on the subject) that no formalities are required in the conveyance of a married woman's

property which is subject to marital control, but the husband must join as a conveying party in order to pass his own interest by the conveyance. So far, if this conclusion is correct, there is no damage done. But in those cases in which the husband's consent cannot be procured, and which entitled the wife to apply for a Judge's order to convey alone, what is to be done? The statute has been repealed, absolutely and unequivocally, without preserving any right. Does the new enactment saving "any right or privilege which she had at the time of the commencement of the Act" revive this right and still enable her to obtain a Judge's order? It must be borne in mind that there is no ambiguity about the repeal, no doubt can arise. The Act allowed an application to be made for an order to convey as a *feme sole*. The Act provided for no other right. The Act was repealed. The right is gone. Does a mere direction that the construction of the repealing clause is not to impair the right that was taken away by the repeal operate to revive the whole enactment? If not, then what right or privilege is saved?

The next section makes the wages, earnings, moneys and property gained or acquired by a married woman in any employment her separate property.

Section twenty-three deals with conveyances of married women. The Queen's Printer is again responsible for an error in printing 1883 for 1873. The section declares that "Every conveyance made since the 29th day of March 1873, or which shall hereafter be made by a married woman of or affecting her real estate which her husband signed or executed or shall sign or execute is and shall be taken and adjudged to be valid and effectual to have passed or to pass the estate which such conveyance professed or shall profess to pass of such married woman in said real estate." The enactment of this clause leads us to enquire when the husband should and when he should not join in the wife's conveyance; and being required to join, how he should become a party, i.e., whether as a granting party or merely as expressing his assent.

Though the words of the enactment are wide enough to

include every conveyance, whether the husband was or is a necessary party or not, we can hardly believe that any necessity for joining the husband in the conveyance of separate estate was recognized by the draughtsman. There is no doubt, however, that the uncertainty which pervades all questions affecting conveyance by married women will be increased by this enactment, and out of it will arise the question, Is every conveyance made since 29th March, 1873, by a married woman which her husband has *not* signed invalid and ineffectual to pass the estate intended to have been passed? And also the further question, Is every conveyance hereafter to be made of separate estate which is not signed by the husband to be adjudged invalid and ineffectual to pass the estate intended to be passed? We do not doubt that, in the light of the cases which define what separate estate is, and which declare that it is alienable without the husband's consent, these questions must be answered in the negative; but perhaps it is not every one who will have so little doubt. Then there is another point which was the one probably intended to be covered by this clause, viz., When the husband has joined in and executed the conveyance but has not been made a granting party, is the conveyance valid? There ought to be no doubt that when the husband is a necessary party he should be a granting party. So it has been determined in cases which we have cited in our article published last month on joinder by the husband. Adopting the division of land owned by married women into land subject to marital control and separate estate, wherever it is subject to marital control the husband has an interest in it which must be conveyed, and for this, if for no other reason, he should be joined as a conveying party. Many conveyances, however, have been made in which the husband has been joined simply as a party assenting to the conveyance, and cases of this kind were probably intended to be covered by the enactment under review. If that is the case, great pains have been taken to conceal or make as obscure as possible the intention, in the hope, perhaps, that vague and general language is more comprehensive and efficient than an enactment

couched in terms directed to a specific end. The clause might have been very easily and properly qualified by using the following language :—" Every conveyance made since, etc., or which shall hereafter be made, etc., to which the husband was or is a necessary party, and which the husband signed or shall sign, shall, etc." It is further to be remarked that a deed so signed is to be adjudged to have passed the estate "of such married woman in said real estate." There still remains the question as to the husband's interest. Merely signing a deed will not convey it; and although the deed may be held valid as to the wife's estate the husband might still claim his estate by the curtesy if he survived his wife.

If the foregoing sections increase the doubts that exist concerning married women's property, the next section may be said to be characterized as spreading an evil that might have been removed altogether. The clause in question declares that nothing in the Act shall render valid any conveyance to the prejudice of any title lawfully acquired from any married woman prior to the passing of the Act, nor any conveyance from a married woman not executed in good faith, nor any conveyance of land of which a married woman or those claiming under her is or are in actual possession or enjoyment contrary to the terms of such conveyance. Conveyances not executed in good faith may be dropped out of the discussion. This will leave two classes to be dealt with, namely, titles lawfully acquired by valid conveyance, and titles to land in the possession or enjoyment of the married woman contrary to the terms of the conveyance.

With respect to the first class, the best that can be said of it is that there exists a very strong hope that no case will arise within its limits. If such a case should arise, it may be confidently asserted that very few conveyancers would undertake to determine, without litigating the point under which of two competing conveyances the title was lawfully acquired. It is most probable, however, that very few, if any, cases exist of two persons claiming by deeds direct from a married woman.



The second class of cases arising under this Act is inoculated with the evil with which all the old certificated conveyances are affected. We recently passed some criticisms upon the case of *Elliott v. Brown* (c), in which the same language which appears in the Act to validate conveyances with defective certificates was under judicial cognizance. One would naturally have supposed that, having in view the great differences of opinion expressed in *Elliott v. Brown*, and the unsatisfactory result arrived at, care would have been taken to avoid spreading the trouble to cases that were previously free from it. As we discussed the same point in our previous article we do no more than refer to it at present.

The twenty-fifth section declares that this legislation is not to affect the construction of any Statute heretofore passed. If full effect is given to it we may find therein the salvation which we hope for. Nevertheless, human nature cannot but be affected by the assumed necessities of this legislation.

*County Courts.*—Instead of appealing to the Court of Appeal in cases tried by a Judge, a motion may now be made in term to review the judgment pronounced.

*Devolution of Estates.*—A practice which has become common since the passing of the *Devolution of Estates Act*, 1886, but which was open to question, is now legalized by the thirty-fourth section of the Act. We refer to the practice of taking out letters of administration limited to the personal estate of a deceased only, instead of taking them out for the whole estate real and personal. The practice arose partly out of the difficulty in giving security for the real estate, and was partly due to a misconception of the effect of the Act. The difficulty in giving security is a serious obstacle to the working of the Act and is not removed by the present enactment which permits the granting of letters limited to the personal estate. In order to make title to the realty, letters must be taken out or the succession remains vacant. The opinion that the heirs-at-law,

(c) Ante p. 141.



or those who formerly were heirs-at-law, could partition the land, though erroneous, partly led to the practice which has received the sanction of this legislation, and seems to have received some favour thereby. It must be confessed, however, that a title cannot be made without letters, and the Act though it legalizes the limitation of letters to the personalty, is calculated to create mischief in the transfer of the land of deceased persons. It is also against the spirit of the Act, which in its whole scope creates one fund of realty and personal primarily liable for the payment of debts and distributable without regard to the qualities of the property.

The next section makes a bold dash towards the correction of a very serious inconvenience which we pointed out in criticising *The Devolution of Estates Act* in the first number of this volume, as one of the results of that Act. The covenants in the short form conveyances are made with "heirs and assigns;" and in *The Conveyancing and Law of Property Act*, 1886, there are expressions which show either that heirs are still heirs, or that the legislature entirely overlooked the fact that personal representatives have taken the place of heirs. The enactment of this session boldly declares that in the case of a person dying after the first of July, 1886, his personal representative for the time being shall, in the interpretation of any statute of the Province, or in the construction of any instrument to which the deceased was a party or in which he was interested, be deemed in law his "heirs and assigns," unless a contrary intention appears. This is a crude way of remedying the evil. The defect to be remedied was this. Heirs as heirs did not inherit, and consequently should not be made liable for their ancestors' obligations. The personal representative was not an heir in the sense in which it is used in statutes and deeds, but as he succeeded to the whole estate he should have been made liable to the extent of the assets coming to his hands. Instead of striking at the exact evil and making the personal representative liable (in so many words) for covenants which formerly bound the heir, the Legislature adopted the very crude plan which is set out in

the section under review. It leaves open the question whether heirs as heirs are still liable mediately through the personal representative, or whether they are altogether relieved from responsibility, the personal representative taking their liability. There are also many places in which the word heirs is used without assigns, and some cases exist in which the words assigns appears without heirs. Are we to understand that the personal representative is intended to be designated only when the compound term heirs and assigns is used ?

Another very important question arises as the result of the two sections under review. The thirty-fourth section allows letters to be limited to the personalty. The thirty-fifth section makes the "personal representative for the time being" the "heir" of the deceased. In a case in which administration limited to personalty is granted, the administrator will be "the personal representative for the time being" of the deceased. It is remarkable also, that *The Devolution of Estates Act* declares that the real property of a deceased shall vest in the personal representatives from time to time ; and it is evident that there never was in contemplation the granting of letters limited to personalty. We are then in this dilemma. Either the realty vests in the administrator of the personalty or any one who occupies the position of personal representative for the time being, or it does not. If it does not so vest, then under the thirty-fourth section of the Act under review, the administrator of the personalty is liable on real covenants without the realty to answer them. If it does vest in the administrator of the personalty, then the limited letters are not limited but give a title to the realty as well as to the personalty. We may escape from the dilemma by construing the thirty-fifth section as applying not to the personal representative for the time being but to the administrator of the realty for the time being. But this would be saying what the Act ought to be, not what it is—and no doubt is a little beyond the limits of judicial legislative power.

Again, where an administrator is appointed by the High Court in a pending action, he is the personal representative for the time being, and the same question would arise as to the extent of his responsibility.

The policy of the Act in allowing limited administration is certainly to be condemned; and although there is a positive necessity for some legislation making the personal representative responsible in place of the heir, we cannot congratulate the Legislature on the manner in which the reform has been attempted.

Touching the ownership of the land of intestates, a very grave question presents itself, and in our opinion it ought to be dealt with at once. *The Devolution of Estates Act* is, as we have before pointed out, entirely at variance with the genius of our jurisprudence. Land cannot, according to our law, be without an owner. But until a representative is appointed under the Act the land must necessarily be without an owner. The prospective right of the next of kin to share in the distribution, if anything is left to be distributed, approaches more nearly to an equitable right or interest in land, than to anything else, and yet it is not the species of equitable right which we are in the habit of contemplating. The necessity for some person having a title capable of actual demonstration, indicative of absolute ownership and enforceable in courts of law, is essential in order that rights and abilities respecting the land may be defended and borne. In the absence of some one having a title the land must lie, in contemplation of law, vacant. There seems to be no possibility of avoiding this under the present system. An advance might, however, be made upon it by appointing an official administrator who should be an officer of the Surrogate Court, in whom all land should rest upon death intestate of the owner. Such an officer and his successors would always be in existence, ready to succeed to the legal estate at any moment, and to that extent the well-understood maxim of our law could be retained. As an officer of a court he would necessarily be free from liability for actions, but would of necessity be bound to administer faithfully. The result would, of

course, be that in every case of an intestacy administration by the Surrogate Court would be necessary; and to this proposal the first objection would naturally be the expense. This would not be great however. Security for land would be dispensed with, as every act of the official administrator would be an official act done in the presence of the next of kin or their solicitors. The usual winding up proceedings would be taken by the administrator of the personalty, and the cost of selling or partitioning the land would be very slight in addition. Instead of an action on the covenant against the heir or personal representative, the claim on the covenant would be filed with the official administrator; and in cases in which there would formerly have been an action in the High Court, an issue might be sent there to be tried. Without entering further into details we might say that administration in this way ought to be no more difficult than, and not as expensive as, administration by summary proceeding in the Chancery Division of the High Court. Whatever minor defects this plan may possess, it would, at any rate, get rid of the difficulty about seisin of the land upon intestacy, and also the difficulty experienced in getting security for the land in order to obtain letters of administration.

*Distress by mortgagees.*—Section thirty-six limits the right of a mortgagee to distrain for arrears of interest, or for rent in the nature of or in lieu of interest, as against the execution creditors of the mortgagor, or person in possession of mortgaged premises under the mortgagor, or an assignee for creditors appointed before sale of the goods distrained.

The next chapter of the Acts of last session deals with amendments made on the recommendation of the Revising Commissioners.

*Dower.*—The right to dower is hereafter not to be exigible before the death of the dowress' husband. This amendment is the final scene of a rather long history of litigation and discussion. In *McAnnany v. Turnbull* (d), and *Allen v. Edinburgh Life Assurance Co.* (e), it was held

(d) 10 Gr. 298.

(e) 19 Gr. 248.

that the inchoate right of dower was not saleable under execution. And in a subsequent case of *Allen v. Edinburgh Life Assurance Co. (f)*, it was held that the effect of certain legislation mentioned therein made the inchoate right of dower saleable.

It is an extraordinary thing that so much verbiage creeps into Acts of the Legislature. The section in question says that the right shall not "be deemed seizable or saleable;" and the inchoate right of dower is termed "the right of a married woman to dower." Again, if it is not seizable it is not saleable, and if it is not saleable it is not seizable. There is no necessity to use both terms.

As the later case of *Allen v. Edinburgh Life Assurance Co.* determines that the right to dower before assignment is saleable, it will remain subject to execution, the amending Act not extending to that right.

*Election of Benchers.*—An amendment to the enactment respecting the election of Benchers, which should not have been necessary, is now made. We refer to a clause requiring that the scrutineers appointed to count the votes in the election of Benchers shall not be eligible for election as Benchers. Their names are hereafter to be printed on the paper to be sent by the Secretary to each voter, so that the profession may be warned not to cast their votes for them. Heretofore, as we have pointed out, the Benchers have been in the habit of nominating and paying several of their own number to count the votes, a proceeding which has not been looked upon as entirely unobjectionable in principle, though no actual wrong has ever been perpetrated. Still the principle was decidedly objectionable, and might have given rise to serious objection in practice if a close contest between one of the scrutineers and an outsider had ever taken place. We also expressed the opinion that young members of the profession should be appointed scrutineers, as there are numbers of them who have little to do, and would be consequently glad of the employment. We may, perhaps, lay the flattering unction to our soul that the reform made

by the Statute is due to the suggestion made in this Journal, and we rest in hope that the suggestion that young members of the Bar may be employed as scrutineers will also be adopted at the next election.

The secretary is required hereafter to send with each voting paper a list of the *ex officio* benchers, which is proper enough, as many votes for *ex officio* members have been lost. But he is also required to send a list of those elective members whose term of office is about to expire. This is decidedly objectionable on principle, as the official voting paper will practically amount to an official canvassing paper for the Benchers. It may, however, be useful if anything unpopular shall happen to be done before the next election.

*Appeals from Chambers*—An ambiguous section of the Judicature Act, section 86, is amended. The section in question gives an appeal to the Divisional Court from every rule, order, or decision made by a Judge in Chambers, and the section proceeds, "And no appeal shall lie to the Court of Appeal from any such rule, order or decision, unless by special leave, etc." The ambiguity lies in the fact that the latter part of the section denying an appeal to the Court of Appeal, does not confine it to an appeal from the Divisional Court, but leaves it open to be construed as giving an appeal from the order to the Divisional Court and not to the Court of Appeal. That construction leaves the right to appeal from the Divisional Court to the Court of Appeal the same as in other cases. The amendment declares that no appeal shall lie to the Court of Appeal from the Divisional Court unless by leave.

*Libel*.—An Act respecting the law of libel may be designated as an Act to enable public newspapers to libel to a certain extent. No action will hereafter lie for a libel contained in a public newspaper unless a notice is served upon some grown-up person at the place of business of the defendant, specifying the statements complained of. And actual damages only shall be recovered if it appears at the trial that the article was published in good faith, with reasonable ground to believe that it was for the public benefit, not

involving a criminal charge, and under a mistake or misapprehension of the facts, and that a full and fair retraction of any statement alleged to be erroneous was published. The Act is not to apply to libels against candidates for public offices in the Province unless the retraction is made editorially in a conspicuous manner at least five days before the election. As no public offices are filled by election except the office of member of the legislature or member of a municipal council, the proviso is not very extensive.

The Act contains a clause which is unique as a specimen of class legislation. It provides that the Court may order security for costs to be given by the plaintiff in certain cases. The foundation of the motion for security is the want of property by the plaintiff sufficient to answer costs in case judgment is given against him. The defendant must show that he has a good defence in the merits, a little matter that defendants are not averse to setting up in any case, and are always willing to pledge their oaths to, provided their solicitor advises them to defend. He must also shew, that is, he must state on affidavit, that the statements complained of were published in good faith, or he may state that the grounds of action are trivial and frivolous. There should also have been required of the defendant that he should show that the circumstances exist which are set out in the first clause, as entitling the plaintiff to recover actual damages only. It may well be that statements might be published in good faith and yet there might be no ground to believe that they were for the public benefit, nor might any retraction have been made, and yet the defendant may apply for security for costs. But where the libel involves a criminal charge security is not to be granted unless the Court is satisfied that the action is trivial or frivolous, or that actual damages only are recoverable under the first clause.

Finally, every action for libel in a newspaper is to be tried in the county where the chief office of the newspaper is, or in the county where the plaintiff resides at the time the action is brought, with liberty to move to change the place of trial.



*Custody of Title Deeds.*—“ An Act respecting the custody of Documents relating to Land Titles” provides for the deposit in the Registry Office of any document forming or being a title deed, or evidence, or muniment of title to land in the Province. The deposit is not to affect the admissibility or value of any document as evidence. The deposit is to be deemed a sufficient compliance with a covenant theretofore entered into to produce or allow the inspection of the document, or the making of a copy or extract therefrom. The Registrar is not to part with the possession of the document unless in accordance with the order of a Court or Judge, which may be made at any time within five years from the deposit, upon the Judge being satisfied that the applicant is entitled to the document, and that the deposit was made without his consent or the consent of the person entitled at the time of the deposit to the custody, and that there are reasonably important grounds for removing the document from the Registrar’s custody. No provision is made for the production by the Registrar as evidence of documents so deposited, but as this Act is to be read as one with the Registry Act, production may be obtained under the twenty-fourth section of the Registry Act. With respect to deeds drawn in duplicate and registered, one cannot well see the advantage to be derived from this enactment. If it is good policy for deeds to be deposited in the Registry Office, the fewer documents the Registrar has the better. It would be better to abolish the duplicate system, and require the deposit of one deed. Under this Act the Registrar may be the custodian of two originals and one copy.

*Land Titles Act.*—Provision is made in the next chapter for the adoption of the Land Titles Act by other municipalities than York and Toronto. The manner in which this Act is framed affords an exceedingly good test of whether or not the Act is really desired, as we have been so frequently and loudly told it is. The municipality must adopt it by by-law, and the Lieutenant-Governor may then proclaim it in force. So far the working of the Act has not been found to be such a vast improvement upon the



old system. The expedition and cheapness which were promised by the framers of the Act have not been realised, and it has been taken advantage of by speculators only. We say this with great respect for the present Master of Titles, to whom the profession are very largely indebted for great assistance in bringing land under the Act. No officer could have been more obliging or could have done more to make the Act popular. But this system requires a sort of judicial investigation at every step, a transfer being in fact a *quasi* judicial allotment of the land to the purchaser, and great care in identifying parties and otherwise could not be dispensed with.

At the same time that provision is made for the extension of the system, curiously enough provision is also made for the withdrawal of land from the operation of the Act, and as long as this provision exists the success of the measure cannot be said to be complete. A number of alterations and improvements are made by this Act. Amongst them is found the remedy for a defect which was the result of transcribing the English Act. No provision was made by the original Act for barring dower, and practitioners had been in the habit of adding the dower clause from the Short Forms Act. Then the objection was raised that the bar should be under seal. The present Act provides that dower may be barred without a seal. No short clause for barring dower is given. The mode of expression used by the draughtsman is not a happy one. He says: "A married woman shall for the purposes of this Act be deemed a *feme sole*, and may execute without seal any bar of dower or other instrument required under this Act." This reminds one of a *bon mot* of one of the English law journals, that we should not be too liberal in treating a married woman as a *feme sole* or we might bastardize her children.

*Distress for rent and taxes.*—An important change in the law of landlord and tenant has been made this session. The first step is to exempt from seizure by distress all the goods which are exempt from seizure under execution, and are enumerated in chapter 10. In addition to the bed, bedding, and ordinary wearing apparel of the tenant and

his family, goods and chattels to the aggregate value of three hundred and sixty-five dollars are thus exempt. The next section exempts goods on the premises the property of any person except the tenant or person liable for the rent ; but the exemption is not to apply in favour of an execution creditor, a person whose title is derived by purchase, etc., or mortgage from the tenant, goods on the premises under a contract to purchase, goods exchanged by the tenant to defeat the landlord's claim, goods claimed by the wife, husband, daughter, son, daughter-in-law, or son-in-law of the tenant, or of any relative of his in case such other relative lives on the premises as a member of the tenant's family. Goods in a shop controlled by an agent or clerk of the owner of the goods when the clerk is the tenant, are not exempt. The tenant may also set off a debt due by the landlord if he gives notice thereof. The fourth section is peculiar in allowing the tenant to surrender the premises if he claims exemption, thus putting it in his power to get rid of a lease by refusing to pay the rent, submitting to distress, and claiming exemption of his goods.

The strictness of the common law in demanding rent in order to re-enter for forfeiture, is done away with.

Section seven declares that when a growing crop is sold under distress for rent, the purchaser " shall be liable for the rent of the land upon which the same is growing at the time of the sale, and until the crop shall be removed, unless the same has been paid or has been collected by the landlord, or has been otherwise satisfied." A very good mode of exempting growing crops from seizure, as no purchaser would run the risks attendant upon such a transaction.

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## EDITORIAL REVIEW.

**Reports.**

With vacation come several numbers of the reports and time to contemplate them. While we are reforming everything we might as well reform the reports. Not long ago a correspondent pointed out some incongruities in digesting the reports which we hope will disappear before long. The chief object in having an Editor should not be that the press may be well corrected, but that something like uniformity should prevail. Great diversities must necessarily discover themselves amongst the reporters, but harmony should be preserved by the Editor. Nothing is more aggravating than to be obliged to look under three or four different titles for a case which is known to be within certain dates; and nothing is so easy to prevent, if but a scheme for digesting be once laid down and adhered to.

Another very substantial improvement might be made which would shorten the reports, and at the same time save labour in reading them and expense in printing them. We refer to the practice of writing and printing several judgments where one would be sufficient. It is not an infrequent thing to find as many as four statements of facts in four judgments, when one statement by the reporter, either taken from the judgment or prepared by himself, would be quite sufficient and a deal more scientific than the present mode. Nor is it essential that there should always be a judgment of each judge. A dissenting judgment should of course always be printed, except in a Court of last resort. Where the judges differ in their interpretation of facts or law while arriving at the same conclusion, it is safer perhaps to print all their judgments, though in many cases they might dispose of the case upon points on which all are agreed; but when all are agreed there is no real necessity for doing more than delivering the judgment of the Court, and that as shortly as possible.

**Vacation.**

While the revision of the rules of practice goes on an agitation has commenced for a change either in the length of vacation or its date. Hitherto we have regarded vacation as a welcome excuse for cessation from work during hot weather. Opinion seems to have changed and now it is desired by a number of the profession that the vacation should extend into a period of the year when the heat is not so intense, and when some enjoyment may be taken out of holiday making. In order to accomplish this several plans have been suggested. First, it was proposed to have vacation extend from 15th July to 15th September ; secondly, from 15th July to 30th September ; thirdly, from 1st July to 15th September. While vacation is absolutely necessary, both for the judges and practitioners, care must be taken not to let it interfere too much with public business. The lengthening of the vacation would probably not be tolerated unless some arrangement were made for holding Chambers for motions for judgment. But there would be no objection to changing the date so as to give holiday makers an opportunity of enjoying a little cool weather and a little sport.

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## BOOK REVIEWS.

*A Treatise on the Law of Deeds*, their form, requisites, execution, acknowledgment, registration, construction and effect. Covering the alienation of title to real property by voluntary transfer, together with chapters on tax deeds and sheriffs' deeds. By ROBERT T. DEVLIN, Counsellor-at-Law. Two volumes. San Francisco: Bancroft-Whitney Co., 1887.

A perusal of the title page of this work gives very fair promise of the contents. A work on Deeds might be almost indefinitely extended if all the law affecting them were treated of. Our author has extended the scope of his work very largely and has made it a most comprehensive work on a variety of branches of law, connected rather with the laws of real property than with the main subject of deeds. The size of the book is rather startling until one's eyes are opened to this fact. In some parts we are bound to say he is rather discursive, not so much in the way of original matter as of citations, producing a great mass of authority for matters that may well go uncontradicted. Still as combinations of facts are never-ending it may in the end lighten labour to have these authorities reduced to shape.

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*A Treatise on the Law of Evidence in Scotland*. By WILLIAM GILLESPIE DIXON, Advocate. Recast, adapted to the present state of the law, and in part re-written, by P. J. HAMILTON GRIERSON, B.A., Oxon., Advocate. Two volumes. Edinburgh: T. & T. Clark, 1887.

The general principles or rules of evidence which are necessarily the same as the principles of the English law are very clearly expounded in this work, and are generously illustrated by example. The frequent references to Starkie,

Taylor, Best and Bentham give the book a familiar air, which, however, is offset to a great extent by the peculiar jargon of the Scottish law. The style is conspicuous for clearness and precision; and on the whole one might well describe the book as entertaining. Whether this is peculiar to works on evidence or not we do not undertake to say; but the same feeling is excited by reading this work that was produced by first reading Mr. Taylor's work, namely, that the law of evidence is one of the clearest and easiest branches of law. Since experience teaches one that constant reference is required in this as well as other departments, we must perhaps lay the charm of the work to its style.

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## REVIEW OF EXCHANGES.

*Law Journal*—1st. January, 1887.

**The Half and Two-Thirds Rules.** *In Re Oliver* 56 L. J., Ch., 75, the liability of trustees who had lent more than half the value on house property was discussed. The foundation of the rule is found in *Stickney v. Sewell*, 1 M. & Cr. 8, where it was said that trustees ought not to lend more than two-thirds on freehold agricultural property, and in the case of house property, not to lend so much as two-thirds. Subsequently the rule has developed into a prohibition against lending more than one half in the latter case. The valuer should be told that it is a transaction of trust, and if his ideas as to the proportion to be borne by the loan and the value of the security are obscured or confused, he should be enlightened.

*Ibid.*—8th January, 1887.

**Liability of Pensions to Execution.** A number of cases are cited in which pensions have and have not been held liable to process. The learned writer concludes as follows:—"It must not therefore be supposed that pensioners under an act hold their pensions as married women under a settlement without power of anticipation. The statute must first be looked at, and if there is no probability of alienation either in words or spirit the question arises whether the pension is for past services only. If so, it can be attached, but if it is for continuing services, although not made inalienable by statute it cannot be attached."

*Ibid.*—22nd January, 1887.

**The Assignment of Future Chattels.** The description in a bill of sale included "all the book debts due and owing, or which might during the continuance of the security become due and owing." The Court of Appeal held that the description of the book debts was too vague, that specific performance would not have been decreed in equity, and therefore that the book debts did not pass, even when they came into existence and were ascertained. After citing several cases the learned writer concludes:—"The result appears to be that, while general vague words following specific identifications of future property will not prevent that property from passing, no property passes when all the description is vague. This rule is subject to the suggestion of Lord Justice Cotton that it is only in the case of growing crops that general vague words following specific words can be held to pass future property, but that in the case of chattels the addition of vague words destroys the definiteness of those before them. The most practical view would seem to be that the vague words may be treated as surplusage, a view which shows that *Belding v. Read*, 34 L. J. Ex. 212, and other cases are no longer law."

# THE CANADIAN LAW TIMES.

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SEPTEMBER, 1887.

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## LIS PENDENS.

*Foundation of the doctrine.*—The doctrine of *lis pendens* is sometimes said to depend upon or to have arisen from the principles of constructive or implied notice as applied by the Court of Chancery. “And therefore,” says Story, “a purchase made of property actually in litigation *pendente lite* for a valuable consideration and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit” (a). But Lord Cranworth has shown that if the rule rested on the doctrine of implied notice, the consequence would be that the person affected with notice of the action would be also affected with notice of everything reasonably deducible from or appearing in the suit. It will be seen that this is not so. And his lordship puts it upon the ground that a litigant party cannot, pending the litigation, confer any right to the property in dispute so as to prejudice the opposite party; and thus proceeds: “Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings.

(a) Eq. Jur. s. 405.



If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence" (b). His lordship also states, and this is worthy of note, that the doctrine is not confined to Courts of Equity. In the old real actions the judgment bound the lands notwithstanding any alienation by the defendant, *pendente lite*. So, Lord Justice Turner, in the same case said: "The doctrine of *lis pendens* is not, as I conceive, founded upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice. It is, as I think, a doctrine common to the Courts both of Law and of Equity, and rests, as I apprehend, upon this foundation—that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienation *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding" (c). And again, "It is very reasonable," said Sir Thomas Plumer, "that the litigating parties should be exempted from the necessity of taking notice of a title acquired under such circumstances [*pendente lite*]. With regard to them it is as if it had never existed: otherwise suits would be indeterminate, if one party pending the suit could by conveying to others create a necessity for introducing new parties. The voluntary act therefore of the defendant, conveying to another, cannot vary the situation or affect the rights of the plaintiff. The *lis pendens* is presumptive, if not actual notice; and the purchaser is in the same situation in which the vendor stood, upon the plain principle that the suit is to be decided according to the state of things when it was instituted; and the rights, however they may be varied by death, bankruptcy, etc., cannot be affected by the voluntary

(b) *Bellamy v. Sabine*, 1 De G. & J. 578.

(c) At p. 584.

act of either party" (d). And it was said by Lord Chancellor Manners in *Gaskell v. Durdin* (e), "The rule of this Court undoubtedly is, that any interest acquired in the subject matter of a suit pending the suit, is so far considered a nullity that it cannot avail against the plaintiff's title; and if this rule were not attended to, there would be no end to any suit; the justice of this Court would be evaded, and great hardship and inconvenience to the suit necessarily introduced." It is thus seen that it is one of the essentials of the proper administration of justice, or one of the necessities of mankind, that there should not be allowed any such disposition of the property in litigation as might interfere with the action of the court or the rights of the plaintiff; otherwise, as it is said, the Court could never arrive at a judgment, for the defendant would constantly and successfully evade that result by alienating the property; and though he might be punished by committal if he did not effect his escape, the plaintiff would be left without relief as to the property in question. So out of this policy grew the rule that all persons must take notice of what is going on in the Courts of Justice; they are treated as having notice whether in point of fact they had or had not any knowledge of the suit, and they buy the subject matter of the suit at the risk of what might be adjudged concerning it in the suit. It must be borne in mind however, that the doctrine does not rest upon the doctrine of notice, but is as we have seen common to Courts of Law and Equity. We may, to exemplify this, cite from Coke an ancient rule, which clearly shows the reason of its existence. "Upon a judgment in debt, the plaintife shall not have execution, but only of that land which the defendant had at the time of the judgment, for that the action was brought in respect of the person, and not in respect of the land. But if an action of debt be brought against the heire, and he alieneth hanging the writ, yet shall the land which he had at the time of the original purchase be charged, for that the action was brought against the heire in respect

(d) *Metcalf v. Pulvertoft*, 2 V. & B. 205.

(e) 2 B. & Beat. 169.

of the land" (f). As long as it is an object of the suit to get possession of, or a lien upon, or to have sale of, the property in litigation, the proceedings must be in the nature of proceedings *in rem*, and the Court must have some means of holding the property *pendente lite* so as to be able to act upon it by execution when judgment is given. And it is said by Lord King that the equitable rule is "in imitation of the proceedings in a real action at common law, where, if the defendant aliens after the pendency of the writ, the judgment in the real action will overreach such alienation" (g). And Coke also shows the application of the maxim *pendente lite nihil innovetur* in actions of *quare impedit* (h).

*What is a lis pendens.*—A *lis pendens*, as the name implies, is a pending suit. The filing of the bill under the old chancery practice was the commencement of a *lis pendens*, though the *subpœna* had not been served (i). It is not the decree or judgment that binds but the pendency of the suit. For as it is a transaction in a sovereign court of justice it is supposed all people are attentive to what passes there (j). "Where the lands, or the profits of the lands, which is all one, are directly in demand the title is bound from the bill exhibited, and the purchaser *pendente lite* comes in at his peril" (j). And for the reason also that from the time of the writ issued the subject matter is before the court and must be amenable to the judgment to be pronounced, this must be so. So, also, an administration suit is a *lis pendens* with respect to estates sold under the decree therein (k); and so now we presume an administration commenced by summary proceeding instead of by writ would be a *lis pendens* with respect to the property to be administered, though no means of registering a certificate is provided. By several English statutes certain proceedings

(f) Co. Litt. 102, a, b.

(g) 2 P. Wms. 483.

(h) Co. Litt. 344, b.

(i) *Drew v. Norbury*, 3 J. & L. 282. See *Juson v. Gardiner*, 11 Gr. 23.

(j) *Worsley v. Scarborough*, 3 Atk. 392.

(jj) *Croft v. Oldfield*, 3 Sw. 278.

(k) *Drew v. Norbury*, *supra*.

are specially vested with this character. By our own statute, *The Administration of Justice Act*, a summary proceeding to set aside a fraudulent conveyance is a *lis pendens*, and a certificate of *lis pendens* may be registered against the lands in question (l). In the latter case there is a *lis pendens* as soon as the summons or order *nisi* is granted.

It is not every action or proceeding instituted by which property may be affected which is a *lis pendens*. Inasmuch as the plaintiff must now obtain a certificate and register it to obtain the benefit of a *lis pendens*, we may enquire when he is entitled to the certificate. The wording of the certificate of *lis pendens* is, “ I certify that in a suit or proceeding in

between A. B. and C. D. some title or interest is called in question in the following land :—” (m). The wording of this certificate is itself a very good test of the right to issue it. In *White v. White* (n) a certificate of *lis pendens* was issued in a suit for alimony, and was attempted to be sustained on the ground that if the husband aliened his land the wife’s decree for alimony would be worthless ; but the certificate was set aside as an abuse of the process of the court. This practice has been ever since adhered to ; and so there must be some allegation of right to land or some question respecting the title appearing on the plaintiff’s writ to entitle him to the certificate.

If, however, a husband had already aliened his land, the wife might well, on an allegation of a fraudulent attempt to evade payment of alimony, in an action therefor and to set aside the conveyance, obtain a certificate of *lis pendens*.

The rule or maxim *pendente lite nihil innovetur* was no doubt a harsh one when a purchaser in good faith for value and without actual notice of the suit acquired the property. And in *Sorrell v. Carpenter* (o), Lord Chancellor King said it was a difficult matter to search for bills in equity, or to be able to get notice of them, many being kept in the clerks’

(l) R. S. O. cap. 49, sec. 16.

(m) R. S. O. cap. 40, sec. 90.

(n) 6 P. R. 208.

(o) 2 P. Wms. 483.

The effect of a purchase *pendente lite* is to bind the purchaser, but he not being a party to the action and so not directly amenable to process, it becomes a practical question as to how he is to be reached so as to affect him with the judgment. In two cases (x) it was said to be clear that an equitable title taken *pendente lite* was bound, the only doubt being whether it might not be necessary to institute a suit to defeat the conveyance though no doubt existed with regard to the result of such a suit. But the doubt is apparently settled by two Irish cases to which we now refer. In *Gaskell v. Durdin* (y) the plaintiff has been decreed to the possession of certain lands and was during the cause put into possession by injunction. In order to accomplish this, one McCarthy who had pending the cause taken a lease from the defendant was dispossessed. McCarthy then obtained an order *nisi* for a writ of restitution. It was argued against the order *nisi* that McCarthy's title was legal, whereas the court would only act against equitable interests; and *Winchester v. Payne* (z) was cited to show that where the legal estate is conveyed *pendente lite* the bill must be amended; but Lord Chancellor Manners said that any interest acquired in the subject matter of a suit pending the suit is so far considered a nullity that it cannot avail against the plaintiff's title, that it would be extremely difficult to draw any line and very dangerous to allow of the rule being frittered away by exceptions, and after looking into the authorities his Lordship said that whoever had dealt with the defendant for an interest in the property after a bill filed had dealt with it *subject to such decree as might eventually be pronounced*. "And although," his Lordship proceeded, "perhaps I could not compel the tenant to deliver up the lease to be cancelled or direct a re-conveyance without a bill for that purpose, yet I can give the plaintiff the benefit of his decree by an injunction

(x) *Winchester v. Beaver*, 3 Ves. 314; *Winchester v. Payne*, 11 Ves. 194.

(y) 2 B. & Beat. 167.

(z) 11 Ves. 194.

to put him into possession . . . In the case of *Garth v. Ward* (a) Lord Hardwicke very decidedly held the same opinion. The tenant is, I am aware, *without remedy*, except or against his lessor, and it is fit that he should be for it is his own fault in dealing with the property pending the cause." The other case is *Moore v. McNamara* in the same volume (b) in which a suit was instituted against a devisee for an account and to raise sufficient to pay his testator's debts by sale of the land. *Pendente lite* he made a lease, and a motion made to sell the land discharged of the lease was refused, the assets being sufficient without. But in the judgment it was said that "the court will pay no regard to a lease so obtained but will execute its process by giving the possession to the claimant; nor will this court, on motion, relieve a person so dispossessed but leave him to institute a suit for the purpose of rendering the title so acquired available if he can."

In concluding his judgment Lord Chancellor Manners said that he thought there must be a suit instituted for the purpose of setting aside the lease. And *Sorrell v. Carpenter* (c) was such a case. A bill was brought against the defendant to have the benefit of a decree obtained against one Ligo for the recovery of a leasehold estate. Pending the bill against Ligo he assigned to Carpenter, and the bill was brought to get the benefit of the decree. The suit failed through a technical defect in proof, to the satisfaction of the Court, who thought it a hard case, as the purchase was *bona fide* and for value. But the principle was well recognized that the plaintiff was entitled to the benefit of his decree notwithstanding the alienation.

We might also refer to a case of *Self v. Madox* (d), in which the defendant was ordered to pay a sum of money or deliver up possession of a house and lands to the plaintiff. Pending the suit he conveyed to a creditor, who had no notice, and the Court decreed possession without regard to the conveyance. And again, "If a lien was brought for

(a) 2 Atk. 174. .

(b) 2 B. & Beat. 186.

(c) 2 P. Wms. 482.

(d) 1 Vern. 459.

land, and the party sells it before decree for valuable consideration, and afterwards there is a decree for the plaintiff for the same land, the sequestration will overreach the purchaser, though for valuable consideration, because it was made upon a *lis pendens* " (e). And in another case where the defendant assigned chattels pending a suit concerning them, and there was a reference to the master by the decree, Mowat, V.C., said " the master may make the purchaser a party under the general orders of the Court; but no direction as to this is required in the decree " (f).

We deduce from these authorities that the plaintiff may, notwithstanding the alienation, proceed to judgment with his action, his title not being affected thereby; that if the Court pronounces judgment in his favour it will put him in possession of the property; if necessary, that the plaintiff may bring an action to cancel the conveyance to the purchaser; that, if the purchaser desires to enforce his conveyance he must bring his action for that purpose.

*Plaintiff must be diligent.*—A *lis pendens* being a bar to effective alienation amounts to an injunction against or a restraint upon alienation; and therefore the plaintiff is bound to proceed with as much diligence as if he had an injunction to restrain the defendant from disposing of the property (g). Hence an action in which a certificate of *lis pendens* has been issued will be dismissed if not prosecuted diligently. So where a bill had been filed and a *lis pendens* registered, but the bill had not been served within the twelve weeks allowed for service it was dismissed with costs (h).

*Discharging lis pendens.*—The certificate of *lis pendens* is merely a certificate that an action is pending in which some right, title or interest concerning the land is in question. It is an allegation of a fact—the existence of a dispute as to title in a pending action. Two results have been held to flow from this, the first, that upon dismissal of the

(e) *Bird v. Littlehales*, 3 Sw. 299.

(f) *Lindsay v. Bank of Montreal*, 13 Gr. 66.

(g) *Finnegan v. Keenan*, 7 P. R. 386. See also *Preston v. Tubbin*, 1 Vern. 286.

(h) *Somerville v. Kerr*, 2 Ch. Ch. 154.



action there is no need of a further order discharging the *lis pendens*, and the second, that until the action is dismissed or disposed of, the *lis pendens* cannot be discharged or got rid of.

As to the first, it was long ago decided that where a certificate of *lis pendens* had been registered, and the bill was afterward dismissed, it was sufficient to register a certificate of the decree or order dismissing the bill (i). Again, where a decree on further directions had been registered against the defendant's land, and the original decree was afterwards reversed on rehearing, it was held that the order reversing the original decree destroyed the lien created by the registration of the decree on further directions (j).

With respect to the second result, it has been frequently decided that no order can be made discharging a *lis pendens* in a proper case for the issue of a certificate. The only manner in which it can be got rid of is by dismissing the action (k). To set aside the certificate that an action is pending while the action is still pending has been treated as an impossible thing (l). When a certificate is issued in a proper case, that is, in a case where the title to the land or some interest in it is really in dispute, there is no doubt that it would be a contradictory order, to some extent, if the Court ordered that there should be no *lis pendens*. It is, however, respectfully submitted that the Court might exercise its jurisdiction to get rid of the certificate in a proper case, imposing such terms as might be just. It may be a matter of great moment to bring about a sale of land at a particular time, the advantage presented at that particular period being a passing one, and one that might be lost altogether by delay. The Courts have, in modern times at any rate, shown a disposition to take advantage of the individual efforts of parties to secure advantageous dispositions of property under their control ; and indeed to

(i) *Dexter v. Cosford*, 1 Ch. Ch. 22.

(j) *Graham v. Chalmers*, 2 Ch. Ch. 53.

(k) *Graham v. Chalmers*, 2 Ch. Ch. 54.

(l) *Poster v. Moore*, 11 P. R. 447.



refuse to do so would be to bring the administration of justice into disrepute by sacrificing property to the delay consequent upon carrying out the proceedings necessary to arrive at a sale by the Court. When a case of this kind arises, it may be most advantageous to both contending parties that the land itself should be rid of the fetters laid upon it by the registration of the *lis pendens*, in order that a purchaser may acquire a good title speedily, the purchase money being substituted for the land in the litigation. To deny the possibility of disposing of a *lis pendens*, except by dismissal of the action, is to assert that even where the parties themselves concur in the advisability of a sale and in their desire to rid the lands of the equities in litigation between them, the Court cannot aid them. For if there is no jurisdiction, no power, to set aside a certificate of *lis pendens* properly issued, the consent of the parties cannot give jurisdiction. The result of this holding is that by registration of a *lis pendens*, the land becomes so hopelessly entangled in the litigation, that nothing can free it therefrom but trying the action. With great deference for the authorities cited, we cannot agree with them. That the removal of a *lis pendens* may in many cases be desirable (the plaintiff being secured) is apparent, but we venture to go further and say that it may well be done consistently with the whole doctrine. It will be observed that the wording of the certificate is not "I certify that an action is pending in which, etc.," but it is "I certify that in an action pending, etc., some title, etc., is called in question in the following land." Now it is quite competent for the parties to agree that the action shall proceed, and yet that the title to the land shall no longer be in dispute, but that the title to the proceeds of the land shall. If the certificate were as first above set out, it would be contrary to fact to say that an action was not pending, though even if the certificate did run as suggested, it might well be said that no action was pending in which the title to the land was in dispute, if the object of the suit were to try the title to something substituted for the land. But in the case of the certificate, as it is actually issued, there does

not seem to be any real objection to making an order reciting that it appears advantageous to dispose of the property freed from any claim of the plaintiff and defendant, and to have the purchase money lodged in Court to answer the plaintiff's claim in lieu of the land, etc., and for that purpose to discharge the certificate of *lis pendens* issued. Where the *lis pendens* is improperly issued, as in the case of a fictitious contract, in order to prevent the defendant from alienating, it is clear that the Court will interfere, and if satisfied that the plaintiff's claim is fictitious, that is, if no actual question of title is involved, will discharge the certificate of *lis pendens*. If, instead of compelling an enquiry into the plaintiff's title or claim to ascertain its validity, the plaintiff chooses to abandon his claim to the land provided he is allowed to fasten it upon something else as valuable, there is no reason why the Court should not similarly discharge his *lis pendens*. To so allow or order a sale, even *in invitum*, would only be to do at an early stage of the action what the plaintiff is asking to have done at a later stage, namely, sell the land to satisfy his claim (m).

Again a *lis pendens* is, as we have seen, of the nature of an injunction against alienation, and the court has on the ground of convenience dissolved an injunction to permit of an advantageous sale. (n)

Where the certificate is issued in an improper case we have seen that the court will set it aside as an abuse of the process of the court. This may appear from the frame of the action itself as far as it is disclosed by the writ, or it may form the subject of enquiry. So in an alimony action, where being no question of title raised as to the defendant's land, but only the fear that he may by alienation defeat the plaintiff's claim, the certificate will be refused by the officer of the court, as it would be an abuse of the process to issue it.

(m) These remarks do not of course apply to actions in which the plaintiff claims the possession of the land in an action to recover it.

(n) *Hadley v. London Bank*, 3 D. J. & S. 63.

But where the frame of the action is such that upon the face of the writ some title or interest in the land is called in question, then, though the plaintiff's claim is entirely fictitious the certificate will be issued, and must remain until the writ is disposed of. It is not the issue of the certificate of *lis pendens* that is an abuse in a case of this kind, but the commencement of a fictitious or malicious action. In order to get rid of such an action there must be a direct admission by the plaintiff of the fictitious nature of his action (o) or absolute demonstration that the issue of the writ is an abuse of the process of the court (p).

Where the plaintiff in a class suit has obtained a decree or judgment it enures to the benefit of other creditors, and though he is paid off, the decree may still be taken advantage of by other creditors. Consequently where a judgment is pronounced in such a case the action cannot be dismissed nor can a *lis pendens* registered be discharged (q).

(o) *Jameson v. Lang*, 7 P. R. 404.

(p) *Sheppard v. Kennedy*, 10 P. R. 242.

(q) *Arnbery v. Thornton*, 6 P. R. 190.

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## EDITORIAL REVIEW.

**Codification.**

Mr. Irving Browne has some points for the advocates of codification in the *Albany Law Journal*, which are a condensation of an argument before a Committee of the Senate Judiciary Committee of New York in favour of the proposed civil code of that State. The points are stated briefly and with the usual emphasis with which the advocates of the code express themselves. They are interesting to us at this time, as the profession have taken so great a part in the present revision and consolidation of our rules of practice. Though a Code of procedure does not rest upon quite the same grounds as a Code of laws, there are certain characteristics common to both, and Mr. Browne's points have an interest for us on that account.

The first point in favour of a Code is expressed as follows : "Because the common law is uncertain, fluctuating, inaccessible, inconvenient, expensive, without authority." The inconvenience and expense of the common law as dealt with by Mr. Browne, are partly the inconvenience of having so many books to consult and the expense of buying them. That the public should ever bewail the fate of lawyers who are put to inconvenience and expense by reason of the books which they have to buy and consult, is something so improbable that we may well say that the public will never be induced to speak out in favour of a code for that reason. Even if the law were codified, we do not think a lawyer could be educated by conning over its bald propositions. Take for instance the article in the Civil Code of Lower Canada, which we quote from memory : "The consorts cannot benefit one another." What a history, social, political and legal this opens up to an educated lawyer ! What a meaningless, dry, meagre, uncompromising proposition to layman ! Take it even as a basis upon which might be built enabling amendments of the law. How, without

knowledge of the history of the article, could prudent amendments be drawn? Then, are there no commentaries the codes? or do the codes render the law so simple that he who runs may read and avoid litigation?

If litigation is not lessened by codification neither will its expense be lessened. It is true it is expensive "to employ lawyers to search" their books. This is rather a captious way of putting the argument. But when a lawyer is employed, not to search books merely, but to conduct a case or advise his client, he is not going to throw away his profits merely because he can do his work more easily under a code than without one. As a rule, the ease with which a man transacts business increases with his skill, and the fees increase in proportion. Again, if codification lessens litigation, fees must go up in order to make up the loss consequent upon the falling away of business. In any event litigation must always be expensive in this view that where a man's rights are invaded he must be put to inconvenience and expense on account of the wrong done.

In reading through Mr. Browne's examples of the uncertainty of the common law, one is struck with the multitude of propositions whose uncertainty is due to the fluctuating decisions of American Courts, or rather perhaps the diversities of the laws of different States as interpreted by their Courts. For example, "Is a bank liable for the neglect of a distant correspondent in making a collection for its customer?" Others are matters of policy; for example, "Are exemplary damages proper?" There is no doubt that exemplary damages are frequently awarded and allowed by law. If they are improper, abolish them by statute. But it is a matter of policy or opinion whether they should be abolished or not. Where the uncertainty of the law is due to the diversity of decisions in different States, codification would be useless unless a Federal or National Code were adopted. For the diversity would remain if the State decisions were taken as exhibiting the State laws and so codified.

When Mr. Browne touches upon the fluctuations of the

law he touches a very raw spot. "First, the judges distinguish a case ; next, they limit it ; next, they criticise it ; then they doubt it ; then they deny it ; and at length, familiarity having bred contempt, they overrule it." That this is the fate of many a case is doubtless true, and the public have to suffer for it. But when we consider that many such cases have been, and indeed are always likely to be, decisions upon the construction of statutes (which are fragmentary codes) we are inclined to hesitate when asked to believe that cases upon the construction of a code would never be doubted or overruled. In another view, one which Mr. Lawson has well exemplified, the fluctuation of the law is both natural and advantageous. In two articles contributed to the *Southern Law Review*, and published in the February and April numbers of 1881, this subject is treated in a manner which shows certainly that the fluctuation in decisions would have been prevented by a code, but it shows also that statutory variations would have been necessary, accompanied of course by the usual number of decisions necessary to obtain a proper construction of them.

That the Common Law is without authority because courts divide, and judges dissent, and the minority sometimes overrule the majority will hardly be accepted as entirely correct. Judges might still divide and dissent, a code notwithstanding ; but would the code be without authority ? Judges divide and dissent upon the construction of a statute ; but is the statute without authority ?

That the citizen has a right to know the law is indisputable. But that he would gain much information by reading a code we deny. That codification would reduce the volume of reports is a matter upon which some statistical information might be forthcoming, but without it we ought not to be asked to accept the statement.

Without denying that many beneficial results must certainly flow from codification where codification is practicable we do not think that those most desirable ends, certainty, cheapness, convenience, and universal knowledge of the law, will ever be attained by simply codifying the law.

**Disallowance.**

The power to disallow provincial Acts has recently been brought prominently forward by the exercise of the power by the Governor-General in Council in the case of the railway legislation of Manitoba. Some of the arguments which have been used against the right of the Governor-General to disallow provincial statutes are based upon the most unsound theories of our constitution. The weakest is that which takes for its premises the proposition that the legislation is strictly within the local legislative power, and concludes that there is no right to disallow such legislation. The writer has before pointed out that this view is unsound. The power to disallow is distributed according to the functions exercised by the different legislative bodies. The Dominion forming an integral part of the Empire without regard to its internal provincial divisions, is under the immediate supervision of the Crown as regards its legislation. By the 56th section of the British North America Act, all bills assented to by the Governor-General are to be transmitted to one of Her Majesty's principal secretaries of state, and the Queen in Council may within two years of the receipt thereof disallow any Act. It will be noticed that the Acts must first be assented to; for a different provision exists as to bills reserved for Her Majesty's assent and bills vetoed. One must assume that the British North America Act here refers to statutes within the competence of the Parliament of Canada to pass; for we cannot assume that in framing the constitution, the draughtsmen looked forward to placing this check upon the presumptive transgression of its powers by the Parliament of Canada. Indeed, such a check is from the nature of things unnecessary. The power of the parliament is limited to certain topics upon which it can legislate. If it exceeds its bounds, the Act is a nullity; it does not require disallowance. The power of disallowance is an integral part of the Imperial policy, expressly retained over every colony and dependency in order that Imperial interests may not be interfered with or hampered by colonial legislation. The disallowance of

an Act is a pure matter of policy, and the exercise of the power must always be in the discretion of the authorities in whom it is placed by law. As far as the validity of disallowance is concerned, provided the proper formalities are observed, it must always be legal though it may be tyrannical, despotic, or imprudent. But the acceptance of the constitution as it stands, carries with it the acceptance of every prospective act that may legally be done thereunder.

The same powers that are reposed in the Queen in Council with regard to the Dominion legislation, are reposed in the Governor-General in Council with regard to provincial legislation. There is no privity, so to speak, between the provinces and Her Majesty with regard to legislation. In other words, there is no Imperial control over provincial legislation. Being concerned with purely local affairs, it cannot interfere with the Imperial policy. But inasmuch as it may interfere with the policy of the Dominion, to the Governor-General in Council is given the right to disallow any Act of the provincial legislatures. And this power may, we presume, be properly exercised with respect to any Act which may interfere with the policy of his ministers. In this case, as in the case of Dominion legislation, Acts which are beyond the power of the legislatures are void, and do not require the exercise of the power of disallowance to prevent their operation. But statutes which interfere with the Dominion policy, and which threaten it by reason of their being valid and so operative unless disallowed—these are the subjects of disallowance. In every case then we must expect to find that the power of disallowance is exercised with respect to statutes which are well within the local legislative power.

The suggestion of a prominent man that a reference should be had to the Imperial cabinet or the judicial committee of the Privy Council for advice upon the subject is somewhat fanciful. The Dominion cabinet might or might not choose to agree to a reference; or they might or might not choose to follow the advice. It is most improbable that they, or any cabinet, would place themselves in a position



in which their advice to the Governor-General might be disapproved of by a body to whom they owe no responsibility. If they have the confidence of the country, the want of confidence of any Imperial body is a matter of indifference to them, constitutionally and politically.

A more curious and important question arises as to the effect of the disallowance of an Act upon all things which took place in obedience thereto before disallowance. The 56th section of the British North America Act says: "And if the Queen in Council within two years after the receipt thereof by the secretary of state, thinks fit to disallow the Act, such disallowance (with a certificate of the secretary of state of the day on which the Act was received by him) being signified by the Governor-General, by speech or message to each of the Houses of the Parliament, or by proclamation, shall annul the Act *from and after the day of such signification.*" The Act is valid then up to the day of the signification of the disallowance. Whether a legislature can pass an Act which will certainly be disallowed, and, having all things in readiness to carry out its provisions, can at once set them in train and accomplish the object of the Act before it is possible that in course of time it shall be disallowed, and can then justify all that has been done under the Act before disallowance, is a serious question. But the object of disallowance would be entirely defeated if that is the law.

#### **Unlicensed Practitioners.**

We refer to this old grievance again with a specific object in view. Complaints have been frequent that the bulk of the conveyancing is in the hands of men who have no other recommendation than that they are commissioners for taking affidavits. Recently, the same class of people have been growing bolder, and it is now the common practice for them to procure letters of administration and letters probate from the Surrogate Courts ;

and we are informed that in many cases they forward their papers by mail to the Surrogate Clerks, who accept them, issue the letters, and return them by mail. Though there is a rule in the County Courts that no business is to be transacted except upon the personal application of a solicitor or his agent, no such rule exists in the Surrogate Courts, we believe, though the practice is most desirable that personal application should be made.

There are however two prohibitions against the transaction of business by unprofessional persons in the Surrogate Courts. The first is statutory, the other by rule of the Surrogate Courts. By the first section of the Attorneys Act (R. S. O. cap. 140) it is declared that "unless admitted and enrolled and duly qualified to act as an attorney or solicitor, no person shall act as an attorney or solicitor in any Superior or Inferior Court of Civil or Criminal jurisdiction in law or equity, or before any Justice of the Peace, or as such sue out any writ or process, or commence, carry on, solicit or defend any action, suit or proceeding in the name of any other person or in his own name." The presenting of a petition accompanied by the necessary affidavits as an application for letters is certainly a commencing of a proceeding in an inferior Court. The offence is punishable under section 27 as a contempt of the Court. It is unquestionably a great hardship that the profession should be obliged to sit by, tamely enduring the wrong that is done them by the unwarranted recognition of unprofessional practitioners by the Surrogate Courts. The remedy, no respectable solicitor likes to seek, and the Law Society who might impersonally prosecute for contempt all such persons are apathetic.

The true and effectual remedy, however, lies partly with the Surrogate Judges and partly with the Inspector of Public Offices. Every grant of letters must come before the Surrogate Judge for his consideration and signature, and as the Act makes the application a contempt of Court, the Judge in our humble opinion ought at least to refuse to

receive the papers if he does not punish the contempt. This is on the assumption that the papers pass the Registrar and reach the Judge.

But the Registrars might effectually bar the way to such applications by refusing to take any notice of them. To this point we invite the cordial attention of the Inspector of Public Offices. The officers of a Court are as bound to prevent an infraction of the statute as the uncertificated man is to obey it, and we have no doubt that if they were notified that hereafter they would be expected to attend to their duties in that respect they would gladly do so.

Another prohibition is embodied in a rule of Court. By rule 5 of the Surrogate Court rules, "Every application to a Surrogate Court for grant of probate or administration, must be by petition signed by the applicant or his attorney." It is true that liability may be evaded by procuring the petition to be signed by the applicant; but the statute prohibits the commencement of the proceedings which is done by the presentation of the petition. A perusal of the rules shows also that the Court contemplated, as they were bound to do, the transaction of all business either in person or by attorney.

Another rule has an indirect bearing upon the matter, and that is rule 36, which prohibits the admission of any affidavit which has been sworn before the party on whose behalf the same is offered, or before his attorney, or before the clerk or partner of such attorney. We cannot, perhaps, call the uncertificated practitioner an attorney, and perhaps the rule either in letter or in spirit does not apply to a case of this kind. But if the Judges of the Surrogate Court recognise these gentlemen as entitled to practise in their Courts, they should enforce this rule. In almost every case, the affidavits are sworn before the commissioner who makes the application.

As there is a clear and effectual remedy for this gross abuse, we trust that the Judges, Registrars, and the Inspector will combine to remedy it.

**Is the Third Party Rule Modern.**

We are apt to think that every legislative provision made at the present day is an advance. But if practice were historically considered it might be found that modern legislation only keeps us up to a standard below which we are constantly liable to fall. Though there was power by a side wind in Chancery practice to bring in a principal debtor when a surety was sued, and though other provisions existed for the determination of questions between defendants, there was nothing either in that practice or in common law which corresponded with the rules relating to third parties. And yet if we look back to the days of common recoveries we find something so strikingly similar that we might almost attribute the origin of the third party rule to this source. Sir William Blackstone says (Leith & Sm. 509), "Let us in the first place suppose Edwards to be tenant in possession, and desirous to suffer a common recovery, in order to bar all entails, remainders and reversions, and to convey the remainder in fee simple to Golding. To effect this Golding is to bring an action against him for the lands ; and he accordingly sues out a writ called a *præcipe quod reddat*. In this writ the demandant Golding alleges he has title and that the defendant Edwards (here called the *tenant to the præcipe*) has no title ; whereupon the tenant appears, and calls upon one Morland, who is supposed at the original purchase, to have warranted the title to the tenant ; and thereupon he prays that Morland may be called in to defend the title which he so warranted. This is called the *voucher, vocatio*, or calling of Morland to warranty ; and Morland is called a *vouchee*. Upon this, Morland, the *vouchee*, appears, is impleaded, and defends the title, and afterwards abandons the defence. Whereupon judgment is given for the demandant Golding, now called the recoveror, to recover the lands in question against the tenant Edwards, who is now the recoveree ; and Edwards has judgment to recover of Morland lands of equal value, to descend to the issue in tail on the former title, in recompense for the lands so warranted by

him, and now lost by his default, which is agreeable to the doctrine of warranty mentioned before. This is called the recompense, or *recovery in value*. But Morland having no lands of his own, being usually the cryer of the Court (who, from being frequently thus vouched, is called the *common vouchee*), it is plain that Edwards has only a nominal recompense for the lands so recovered against him by Golding, which lands are now absolutely vested in the said recoverer by judgment of law, and seisin thereof is delivered by the sheriff of the county." And the learned commentator goes on to show how there may be double, treble, or further vouchers. We have here the exact principle upon which the third party rule is based, with the exception that judgment cannot be pronounced against the third party in the action in which he is "vouched;" nor does the modern rule extend so far as the ancient.

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## REVIEW OF EXCHANGES.

*Albany Law Journal.*—19th March, 1887.

**Boycotting:** An action in the nature of conspiracy will lie at common law if the plaintiff has sustained special damage. So an actor recovered judgment against persons who conspired to prevent him, by hiring persons to hoot and groan at him, from acquiring fame and profit. An action will also lie against a third person who maliciously induces another person to break his contract of exclusive personal service with an employer, thereby causing him injury. Combinations for the purpose of doing an injury to a man's trade, business or calling, are in the nature of a conspiracy and are actionable as such.

*American Law Register.*—March, 1887.

**Diligence required to hold an Assignor or Guarantor,** by W. W. THORNTON. Concluded in the following number. The assignee takes the place of the assignor or payee, and is expected to use the same diligence as if he were a prudent man collecting his own debt. He cannot lie still, thus prohibiting its collection, and when he has lost his debt then demand it of the payee. A number of American cases are cited as to the proceedings necessary to be taken against the obligor before seeking to charge the assignor.

*American Law Review.*—March—April, 1887.

**A National Code of Procedure,** by WILLIAM REYNOLDS. The adoption of a general code of procedure for all the States is advocated. It is said that it should contain a statement of the entire law of evidence in statutory form, and the Indian Evidence Act is approved of. It is suggested that some uniform method should be provided for establishing *prima facie* and by *ex parte* affidavits the genuineness and validity of all bills, notes, open accounts, and sealed instruments upon which suits may be instituted, as well as all such allegations of fact as are required to be formally proved, although not really disputed, such as partnerships, incorporations and the like. It is also suggested that the procedure in criminal cases should be uniform. Indeed it is a little surprising that the whole jurisdiction over criminal law is not vested in the Federal authorities, instead of being distributed amongst the States, thus requiring a formal act for the delivery of any offender by one State to another.

**Responsibility of Attorneys to Clients for Negligence and Errors.** by H. CAMPBELL BLACK. An attorney is liable for loss or detriment suffered in consequence of want of skill or failure to apply such skill with proper care and diligence. He does not undertake to make extraordinary and unreasonable exertions, nor that he is gifted with that measure of sagacity and learning which is attributable only to the most eminent members of his profession. When he has received positive instructions from his client he is not at liberty to contravene them. When he is retained to make a collection he must use reasonable and diligent efforts to collect or he will be personally responsible for loss. Not every mistake or misapprehension of law will render him liable, but ignorance of those principles which every man of ordinary knowledge should know will render him liable.

**Object Teaching in Law Schools,** by WILLIAM HENRY DENNIS. It is suggested that by means of charts and tables the instruction of students should be aided in those matters which now require a dry effort of memory.

**National Corporations,** by RUSSELL H. CURTIS.

**The English Analytical Jurists,** by GEO. H. SMITH. A condensation of Austin's principles of jurisprudence into short propositions.

**Are the Departments of Government Independent of each other ?** By SIDNEY G. FISHER.

*Law Journal.*—26th February, 1887.

**The Doctrine of Free Agency in Contract.** Speaking of the decision in *Scott v. Sebright*, 56 L. J. Rep. P. D. & A. 11, in which it was held that a weak-minded woman, who was pressed into marriage was not a free agent, the learned writer says, "Can there be such a thing as a voidable contract of marriage? There might be in the sense in which the word was used in regard to marriages within the prohibited degrees—namely, that they must be set aside, if at all, during the life-time of the parties—a condition of things altered by Lord Lyndhurst's Act, but in no other case. A state of things in which a man or woman, say twenty years after the marriage, finds that a material fact was kept back, and in which he or she may elect to rescind the marriage within a reasonable time by applying to the Court for the purpose, is totally inconsistent with the idea of the marriage contract." With respect to the performance of the ceremony of marriage it appears that it took place before a registrar in an office which might be mistaken for a private house, and the learned writer says, "The law permitting private houses to be so used is in favour of clandestine marriage and other evils, and it would be well if one of the results of this case was that civil marriages should in future be celebrated nowhere but in a town hall or some public building."

*Ibid.*—19th March, 1887.

**The Extradition Treaty With Russia.** The treaty with Russia came into force on 20th of March last. It is said to be the most thorough extradition treaty that has been made. It is said to contain all the crimes as to which by the Extradition Acts of 1870 and 1873 treaties may be made, and it contains some crimes which for the first time have been put into any extradition treaty. Crimes against girls under sixteen are provided for, and "crimes against bankruptcy law." It also contains a clause that either party may surrender for any other crime for which, according to the laws for the time being in both, the surrender can be made. If two or more high contracting parties claim the same person the first making the claim is entitled to the surrender. The demanding State bears all the expenses. When evidence is required to be taken in the foreign country a "Commission Rogatoire" is to be sent thither for execution according to the law of the State where the evidence is to be taken. The treaty applies to Canada as one of the British possessions, but it will be executed in Canada according to our law, as we have local extradition laws.

**Possession and the Statute of Limitation.** A case of *Lyell v. Kennedy* is discussed in which the defendant in an action of ejectment occupied lands left by an intestate, alleging that he held for the heir-at-law when ascertained. The result of the decision is that if a man holds land during the statutory period he obtains a statutory title, notwithstanding general declarations on his behalf that he holds it for the rightful heir. With respect to such declarations, it is said that they will not affect the statute unless communicated to others who may rely upon them. The relation of principal and agent must be created in the ordinary way.

*Ibid.*—9th April, 1887.

**The Solicitor-Trustee and his Costs.** A case of *Lawton v. Elwes*, 56 L. J. Chan. 295, in which the authority of *Cradock v. Piper* was considered is discussed. The latter case determines that a solicitor not authorized by his appointment cannot earn costs in appearing for himself as trustee, but if he appeared for a co-trustee he may. *Cradock v. Piper* was followed by the Court of Appeal. The learned writer concludes:—"It must, therefore, be taken as settled, so far as the Court of Appeal is concerned, that there is a positive rule of law allowing a trustee-solicitor to earn costs as solicitor for his co-trustee. The present case, involving the magnificent sum of £16 on this point is not likely to go to the Lords, but the present Court of judicial opinion is against Lord Cottenham's view. The distinction which he drew appears to be that the rule against a solicitor-trustee making a profit out of his office must be strictly interpreted, and that he does not make a profit out of his office, but out of the office of some one else, when he acts for his co-trustee. A safeguard which is absent when the solicitor is sole trustee is present when he has a colleague. When he is alone and acts as solicitor, he appoints himself and is master of the situation. When he has



colleagues, they appoint him. If one of these objects to his acting as solicitor, he can appoint another. There is, therefore, considerable practical sense in the distinction now discountenanced, and if it should ever reach the Lords, which is hardly likely, it must not be taken as a foregone conclusion that those who may overrule it will overrule it, but full consideration will have to be given to the principle underlying the whole rule."

*Ibid.*—16th April, 1887.

**Mortgagor's Attornment and Bill of Sale.** A case of *Hall v. Comfort*, 56 L. J., Q. B., 185, is discussed in which it was held that an attornment clause in a mortgage deed does not convert the security into a bill of sale requiring registration. That it does so was held by the late Sir Matthew Cameron in the well known case of *Trust & Loan Co. v. Lawrason*. With reference to the case in review, the learned writer thinks that the case must not be relied upon as deciding the matter beyond the possibility of a contrary view being taken in a higher Court. The English Act is, however, much more comprehensive than ours.

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# THE CANADIAN LAW TIMES.

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OCTOBER, 1887.

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## RIGHTS AND OBLIGATIONS CONNECTED WITH THE PAYMENT OF MORTGAGES.

*Time of Payment.*—At law the mortgagor, in the absence of any express provision to the contrary contained in the mortgage, might make payment at any time on the day named for payment (a); but he was bound to make payment on the very day named in the mortgage, and in default thereof, the mortgagee's estate became absolute. This state of the law was not wholly without its compensating advantages, for at law if the mortgagor did make tender of the mortgage moneys in strict compliance with the provisions of the mortgage, the mortgaged property was thereby released from the mortgage debt, even though the moneys so tendered were refused by the mortgagee, or there was no person there to receive it, and the mortgagor's personal liability for the indebtedness would alone remain to the mortgagee as security for his claim (b).

Courts of Equity have however always treated mortgages (no matter in what form they may be drawn) as being simply security for the re-payment of money and they have always relieved against the strict common law rule, above referred to, upon the equitable principles which in all cases govern them as to penalties and forfeitures.

Even at the present time, in this province, where law and equity are administered in the same forum, the old

(a) *Wade's Case*, 5 Rep. 114a.

(b) *Co. Litt.* 209b.

common law doctrines as to the vesting of the legal estate, upon payment being made in strict accordance with the provisions with the mortgage, are of some importance, for where payment is made after condition broken, relief will be afforded by a Court of Equity, and the mortgagor can obtain a reconveyance of the legal estate in the mortgaged property, only upon his complying with such terms as the court considers equitable, in accordance with the maxim that "he who seeks equity must do equity;" but where, the conditions of the mortgage have been strictly complied with, the legal estate revests in the mortgagor as of right, and without any necessity for a conveyance or for any aid from a Court of Equity (c).

The mortgagor's right to redeem by payment of the mortgage debt continues in equity, in the absence of other overruling equities, until such right is either barred by the Statute of Limitations (d) or is foreclosed by action in a Court of Equity.

#### NOTICE OF PAYMENT, OR INTEREST IN LIEU OF NOTICE.

With regard to the rights of a mortgagee to call in, and of a mortgagor to pay off an overdue mortgage, we cannot do better than quote from an opinion said to have been given by an eminent counsel in 1786, and reported in 2 Cases and Opinions (e).

"It is clear that a mortgagee may call in his mortgage money when he pleases, and may require it to be paid at as short a warning as he pleases; for it never was held, that upon a trial of an ejectment, or upon a bill to foreclose, the plaintiff should be non-suited, or the bill dismissed, because the mortgagee did not give six months' notice to pay the money in, or any other definitive notice. The reason is, because at law the estate is his own; and no notice is requisite to entitle a man to recover his own, who

(c) *Fisher v. Spohn*, 4 Can. L. T. 446; *Burgaine v. Spurling*, Cro. Car. 283; *Merrill v. Chase*, 8 Allen, Mass. 339; *Grover v. Flye*, 5 Allen 543; *Holman v. Bailey* 3 Metc. Mass. 55.

(d) R. S. O. cap. 108.

(e) P. 51.

stands in the situation of a mortgagee ; so that whenever the mortgagee calls for his money, the mortgagor must pay it ; and the mortgagee may at his pleasure proceed at law to recover possession, or in equity to foreclose. But the mortgagor is not in the same situation ; he cannot compel the mortgagee to take his money at a moment's warning ; he must give the mortgagee six months' notice to recover it ; or which is the same thing, pay him six months' interest in advance ; *because the day of redemption at law being passed, he has lost his estate at law, and can be let in to redeem by a Court of Equity only ; and a Court of Equity will not assist unless he will do equity ;* and the court holds that it is equitable that the mortgagor shall give six months' notice of paying in the money to enable the mortgagee to provide another place for it ; so that it is incumbent on a mortgagor to give notice. But when the mortgagee requires payment, all notice is out of the case ; it is not notice but a demand, which the mortgagee has a right to make, without any limitation of time whatever ; and consequently, *when the mortgagee has demanded his money the mortgagor may bring it to him next day, and if he refuses to receive it he can no longer demand interest ; for his demand of the money has made notice from the mortgagor wholly unnecessary.*"

In *Gurgeon v. Gerrard* (f), Maule, J., speaking of the respective rights of mortgagor and mortgagee, says :—" A mortgagee is not bound to accept the mortgage money when tendered, unless reasonable notice has been given of the intention to pay him off, and even after notice he may refuse to receive the sum tendered and dispute the account ; and the only remedy of the mortgagor will at last be to file a bill for redemption. If indeed, on such a bill, it should appear that the mortgagor, after giving to the mortgagee six months' notice of his intention to pay off the mortgage, has actually tendered to him the full amount of principal, interest and costs, and that the mortgagee has obstinately refused to receive it, and has so rendered a suit

(f) 4 Y. & C. at 128.

necessary, the Court would probably fix the costs of the suit on the mortgagee."

V. C. Shadwell, in *Browne v. Lockhart* (g), says:—"It is the usual practice for a mortgagor when he intends paying off the mortgage to give a proper notice of his intention so to do; but I apprehend that there is no law of this or any other Court which requires that to be done; it rests entirely on custom; and the custom is founded on this, namely, that it is but fair that the party who has lent his money upon the security should have a reasonable opportunity, before the transaction is put an end to, of finding some other security on which he may lay out his money, when it has been repaid to him."

It must be remembered that all these remarks refer only to the case of a mortgage which has become overdue, for when the mortgage is paid off upon the day on which the mortgage money falls due, it will of course be unnecessary that the mortgagor should give six months' notice of his intention to pay, since by making payment on that day he is merely complying with the terms of the mortgage contract.

In a case where the mortgagee had given notice requiring payment to be made *on a specified day*, and the mortgagor had failed to make payment at the appointed time, V. C. Malins held that it made no difference whether the notice was given by the mortgagee to pay, or by the mortgagor of intention to pay, since, in either case, the mortgagor would be obliged to look out for a new investment, and that if the money is not paid at the appointed time, a new notice must be given, or payment made as if the first notice had not been given; that is, if payment is made it must be with six months' interest in advance from the day of payment (h).

This right of a mortgagee to receive six months' notice or six months' interest in advance may be waived by him; thus if he institutes any proceedings for the recovery of his mortgage money, he is not entitled either to notice or to interest beyond the day on which payment is made (i).

(g) 10 Sim. 424.

(h) *Bartlett v. Franklin*, 15 W. R. 1077.

(i) *Letts v. Hutchins*, L. R. 13 Eq. 176; *Re Alcock*, 23 Ch. D. 372.

Mortgagees have sometimes claimed that the six months to which the mortgagee is entitled must be so given as to expire on the anniversary of one of the gale days named in the mortgage, but it will be seen that the authorities lend no sanction to such a claim.

Vice-Chancellor Blake has held that the English custom with regard to the mortgagee's right to claim six months' notice or six months' interest is a part of the law of this Province—saying that the same thing has been previously held both by V. C. Esten and V. C. Mowat (*j*).

Even though the mortgage instrument contains a provision that the interest shall be paid half-yearly *in advance*, yet if the mortgagee institutes proceedings for the collection of his mortgage money, he can recover interest down only to the day of payment, calculated without reference to the provision for payment in advance, for "interest in itself implies forbearance, and it is a sum given for the use of money for the time the borrower has it" (*k*).

Where a mortgagee comes in under the provisions of the judgment in an administration or partition action, or any like proceeding, and consents that the property be sold under the direction of the Court free from his mortgage, he is only entitled to six months' interest from the date of his consent, if he be paid within that time, and to interest to the day of payment if he be paid afterwards out of the proceeds of the sale. "It is clear that this is no hardship on the mortgagee, because he has complete notice that the mortgage will be paid off, but not of the exact day on which the payment will be made, but the same thing happens if the mortgagee himself seeks the estate" (*l*).

Where in such a case the purchase money of the property, out of which the mortgage is to be satisfied, is not paid into Court at the time named in the report on sale, the mortgagee is entitled to be paid interest up to the *time*

(*j*) *Lalshaw v. Davis*, 7th June, 1877—Note Book 18, page, 286, 294. See reference to this case in *Re Houston*, 2 O. R. at p. 88.

(*k*) *Trust and Loan Co. v. Kirk*, 8 P. R. 203; *Banner v. Berridge*, 18 Ch. D. at 278, 279.

(*l*) *Day v. Day*, 31 Beav. 270; and see *Matson v. Swift*, 5 Jur. 645, and *Re Houston*, 2 O. R. 84.

*when he is notified that the purchase money has been paid in, and the question whether he is to be paid bank interest only, or such rate of interest as is reserved by the mortgage will depend upon the form of the mortgage instrument and upon the fact whether the mortgage is overdue or not (m).*

The right of a mortgagee to six months' notice or six months' interest is somewhat affected by Dominion legislation.

It is provided by 43 Vict. cap. 42, sec. 5, that "whenever any principal money or interest secured by mortgage of real estate is not, *under the terms of the mortgage, payable till a time more than five years after the date of the mortgage*, then, in case *at any time after the expiration of such five years*, any person liable to pay or entitled to redeem the mortgage tenders or pays to the person entitled to receive the money, the amount due for principal money and interest to the time of payment as calculated under the foregoing sections, together with three months' further interest in lieu of notice, no further interest shall be chargeable, payable or recoverable at any time thereafter on the principal money or interest due under the mortgage."

Section 6 provides that the Act shall apply to mortgages on real estate executed after the first day of July, A.D. 1880.

Section 5 speaks of the principal money and interest "As calculated under the foregoing sections." The foregoing sections, 1 and 2, refer to mortgages made payable on the sinking fund plan or on any plan under which the payments of principal and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, as to which it is provided that no interest shall be payable unless the mortgage contains a statement shewing the amount of principal money and the rate of interest chargeable thereon. The foregoing section 3 provides in effect that no fine or penalty or rate of interest shall be exacted on any arrear of principal or interest, beyond the rate of interest payable on principal money not in arrear; and the foregoing section four provides for the

(m) *McDermid v. McDermid*, 7 P. R. 457.

recovery of overcharges which may have been collected by the mortgagee.

It will be observed that the statute applies only to a case where the mortgage is made *payable more than five years after the date thereof*.

It is possible that it might be held to be inapplicable to a case where a mortgage is made payable in say ten years with a provision that the mortgagor may at any time pay off the mortgage moneys after he has given say three years notice of his intention so to do.

Some doubt has been expressed as to the constitutionality of this Act, but it would appear to be *intra vires* of the Dominion Parliament for section 91 of the British North America Act declares that the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects therein set forth, among which is *Interest*.

As the Dominion Parliament has plenary powers of legislation with respect to the subject of interest, it is presumed that it has power to fix the terms and conditions upon which alone interest shall be recoverable, or indeed to enact that no interest shall be contracted for or recovered in any case whatever.

I have endeavored to express my opinion of this sort of legislative interference with the freedom of contract in an article which appeared in 5 CANADIAN LAW TIMES, 249.

*Place of Payment.*—In the absence of any specific provision in the mortgage instrument the mortgagor is bound to seek out the mortgagee for the purpose of making payment, so long as the mortgagee is in the State or Province within which the mortgage was made (*n*).

If the mortgagee be absent from the country, unless he has appointed an agent and notified the mortgagor thereof, it will be sufficient to tender the money at his place of residence within the country if he have one, and if he have not, then the mortgagor is not bound to make tender, and his failure to do so will not make him lose any of his rights.

(*n*) *Howie v. Volkening*, 49 How. Pr. N.Y. 169.



It would appear from *Sharpnell v. Blake* (o) that even where a specific place for payment is named in the mortgage, this will apply only to payment on the day named in the mortgage, so that wherever it is necessary in such a case to make a tender after the day named in the mortgage, it should be made as if the mortgage said nothing about the place of payment.

In Fisher on mortgages (p) referring to cases where the mortgagee is in the country it is said :—"And it may even be sufficient to tender the money at the mortgagee's house, or last place of abode, though it does not appear that the tender was made to him or even that he was within the house ; but this it is presumed can be only done under particular circumstances, as when the mortgagee is deliberately keeping out of the way to avoid the tender ; or as it happened in a case where there was evidence that the mortgagee had expressed a determination to hold the property as long as he could and after that to transfer it to a particular friend of his own." The case referred to is *Manning v. Burges* (q) the report of which is as follows :—"A mortgage was forfeited, the mortgagor afterwards meeting the mortgagee said, I have moneys now and I will come and redeem the mortgage. The mortgagee said to him he would hold the mortgaged premises as long as he could ; and then when he could hold them no longer, let the devil take them if he would. And afterwards the mortgagor went to the mortgagee's house with money more than sufficient to redeem the mortgage, and tendered it there ; but it did not appear that the mortgagee was within or that the tender was made to him ; and it was decreed a redemption and the defendant to have no interest from the time of the tender because of his wilfulness."

*To whom tender may be made.*—Tender or payment must as a general rule be made to him who has the legal estate and the right to reconvey, that is, if the mortgage has not been assigned, payment should be made to the

(o) 2 Eq. Ca. Abr. 604.

(p) 4th Ed. 737.

(q) Cases in Chancery 29.

mortgagee or his duly authorised agent, and if it has been assigned, payment should be made to the assignee (*r*); but the assignee of a mortgage should give notice to the mortgagor of the assignment, if he wishes to protect himself against a *bona fide* payment by the mortgagor to the mortgagee, for if the mortgagor make such payment to the mortgagor without notice of the assignment, the mortgage will be satisfied even though it has in fact been assigned (*s*).

The mere fact that the assignment is registered will not be notice to the mortgagor of the making of the assignment, for by section 78 of our Registry Act (*t*) the registration of an instrument is made to constitute notice of such instrument to persons only who claim an interest in the lands in question *subsequent to such registration*, and the mortgagor in making payment of the mortgage moneys does not fill that position (*u*); but such registration would be notice to a person who purchased the equity of redemption subsequent to the registration of the assignment (*v*).

Neither will the fact that the mortgagee has not the possession of the mortgage instrument to deliver over to the mortgagor constitute notice to the mortgagor of the fact of the assignment having been made (*w*).

“The law is well settled in this country that the custody of a mortgage upon land, gives no right to the custodian, be he solicitor of the mortgagee or not, to receive any part of the principal or interest secured. The mortgage not only secures money; but it also affects the land, and for its effectual discharge, not only is payment of the money an essential, but equally essential is it that the estate should be reconveyed. For this reason the law does not infer a

(*r*) *Dorkray v. Noble*, 8 Me. 278.

(*s*) *Williams v. Sowell*, 4 Ves. 389; *Engerson v. Smith*, 9 Gr. 16; *Reed v. Marble*, 10 Paige, N.Y. 409; *Hetzell v. Barber*, 6 Hun, N.Y. 534; *Gilleland v. Wadsworth*, 23 Gr. 547.

(*t*) R. S. O. cap. 111.

(*u*) *Gilleland v. Wadsworth*, 23 Gr. 547; 1 App. R. 82, 91; and see *Williams v. Sowell*, 4 Ves. 389.

(*v*) *Gilleland v. Wadsworth*, 1 App. R. 82 and 91.

(*w*) 2 Cases and Opinions at p. 52.

right to receive the money from the mere possession of this kind of security" (x).

*Amount to be paid.*—It is the duty of the mortgagor to ascertain and tender to the mortgagee the proper amount which the mortgagee is entitled to claim, and in the case of a redemption action being brought by the mortgagor, the mortgagee will not be saddled with the costs of the action, on the ground that he claimed more than was actually due to him, so long as the result of the taking of the account in the action is that something is found to be still due to the mortgagee, even though the facts be that the sum so found due is much less than the amount claimed by the mortgagee (y), but if after payment of his just claim in full, the mortgagee makes an unfounded further claim, he will be responsible for any costs of litigation resulting therefrom (z).

A mortgagor is not necessarily bound to execute an assignment or discharge of the mortgage or a reconveyance of the mortgaged premises upon the very day on which the mortgage money is tendered to him; thus it may be that he is asked by the mortgagor to execute an instrument containing some covenant or recital or other matter which will make it proper for him to consult his solicitor before execution, and in such a case he will be justified in refusing to execute until he has had a reasonable opportunity for such consultation. Upon such a case coming before Lord Chancellor Hardwicke he said :—"Where there are covenants on the part of the mortgagee, it is very reasonable that he should have some time to look them over; and the plaintiff's attorney ought to have left the deed for a week with the defendant that he might have an opportunity to advise upon it, and the plaintiff's attorney should have appointed a time to pay the money after the defendant had been allowed a sufficient time to advise; or as I said before he should have sent a copy or the engrossment of the

(x) *Gillen v. R. C. Epis. Corp. Diocese of Kingston*, 7 O. R. 146.

(y) *Cotterell v. Stratton*, L. R. 8 Chy. 295; *Cotterell v. Finney*, L. R. 9 Chy. 541; *Re Watts* 22 Chy. D. 5.

(z) *Gregg v. Slater*, 22 Beav. 314.

assignment" (a). Where the mortgagor tendered the mortgage money coupled with the condition that an assignment of the mortgage should be forthwith executed, and the mortgagee refused to execute it until he had first consulted counsel, it was held that the tender was not sufficient to stop the interest upon the mortgage (b).

The mortgagee is not bound to know the exact amount of his claim, unless he has first been served with notice of intention to pay him off upon a specified day, or unless he has given notice to the mortgagor that he requires payment, but when the time fixed by such a notice has expired the mortgagee is bound to know the amount due to him, and if that sum, or a sum calculated by the mortgagor to be the probable amount of principal interest and costs be tendered to him unconditionally he is bound to accept it. A mortgagee is not bound to accept payment without proper notice given to or by him; but if after proper notice, the amount is tendered to him, and he refuses to accept it, he does so at his own peril" (c).

Where the mortgagee claims more than is legally due and the mortgagor pays it under protest, he may recover from the mortgagee by action the amount so paid in excess (d).

So also where the mortgagee assigns the mortgage to a third person who at the time of procuring the assignment pays under pressure of the mortgagee and under protest, with the sanction of the mortgagor, more than is actually due upon the mortgage, the mortgagor may bring an action to recover the overpayment, and he is not estopped from so doing by the recital in the assignment (to which he was a party) setting forth that the amount due upon the mortgage is the amount claimed by and actually paid to the mortgagee; for although a recital in a deed operates as an estoppel to the parties to the deed where the matter of the

(a) *Wiltshire v. Smith*, 3 Atk. 89.

(b) *S. C. sub nom. Wilshaw v. Smith*, 9 Mod. 441.

(c) Per Sir John Romilly, M. R., in *Harmer v. Priestly*, 16 Beav. at 571.

(d) *Close v. Phipps*, 7 Man. & Gr. 586.

deed itself is in dispute, it is not so in a matter which is collateral to the deed (e).

SUMMARY OF RIGHTS AND OBLIGATIONS ON PAYMENT OF A MORTGAGE.

So admirable a summary of the rights and obligations of mortgagors and mortgagees arising out of the payment of mortgages is set forth in the opinion of counsel reported in 2 Cases and Opinions (p. 51), from which we have already quoted, that we shall give a lengthened extract therefrom: "When the mortgagee has demanded payment of his money, it must be brought to him personally; for though a place of payment is mentioned in the mortgage deed, yet the day of repayment being passed, the mortgagee is not bound to attend there; and therefore it must be brought to him personally. It is thus upon a general demand, but he may give a special notice. The mortgagee, when he makes the demand, has a right to appoint a time and place for payment of the money, and then the mortgagor must attend at the time and place prefixed by the mortgagee to tender the money; otherwise interest will run on to the time of actual payment. But if the mortgagor comes with the money to the mortgagee, or to the time and place appointed, he has a right to require a production and delivery of the mortgage deed, and to have it delivered up to him; as the production and delivery of the mortgage deed is the proper evidence to the mortgagor that the mortgagee has not assigned the mortgage to any other person, but has the right to receive the money. Suppose the mortgagee has received the money from a third person and assigned over and delivered the mortgage deed to the assignee, and then calls on the mortgagor, who is ignorant of the assignment, for the money, and he pays it without enquiring to have the mortgage deed delivered up, most certainly the assignee can have no benefit of the mortgage, nor compel him to pay it over again, though the original mortgagee, who received the

(e) *Fraser v. Pendlebury*, 10 W. R. 104.

money, is become insolvent. But this is confined to the delivery of the mortgage deed ; for the mortgagor has not a right to annex a condition to the payment that the mortgagee shall execute an assignment ; because it frequently happens that a proper assignment or reconveyance cannot be prepared without an inspection of the title deeds in the mortgagee's hands ; and it is understood that a mortgagee is not compellable to produce the title deeds before he has actually received his money ; for otherwise, under pretence of repayment, the mortgagor may look into the title deeds with a view to discover faults and defeat the security ; but the mortgage deed itself which puts him in the character of mortgagee, and without which he cannot resist the production of the title, must always be open to the inspection of the mortgagor, that he may know his right to redeem. It follows, therefore, that when the mortgagor comes to pay his money, either to the mortgagee himself or to his agent, at a time and place appointed, he has a right to expect to find the mortgage deed there, and that it shall be ready to be delivered to him when the money is paid ; and when that has been done he has a right to call for the title deeds to enable him to prepare a proper assignment and to call on the mortgagee to execute it afterwards. The mortgagor is in no danger in paying the money upon receiving the mortgage deed without an assignment ; because the mortgage and the receipt together always show what the debt is, and that the debt is satisfied ; and from thenceforth the mortgagee becomes a trustee for the mortgagor of the legal estate."

A. H. MARSH.

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## EDITORIAL REVIEW.

**Toronto University Faculty of Law.**

The effort to establish a teaching Faculty of Law at the University of Toronto is apparently not meeting with the support which it deserves. It was announced several months ago by the newspapers that a committee of the Senate had met, expecting a conference with a committee of the Benchers, but that as none of the latter attended nothing could be done. If the University has a right to look in any direction for support and encouragement in their laudable effort to encourage the study of jurisprudence, one would naturally suppose that the source from which they might expect aid was the Law Society. But it is from that source that discouragement, if not actual opposition, comes.

Why there should be any hesitation, much less any friction, it is difficult to comprehend, especially as Toronto University is so strongly represented in the Law Society. That may be cited as evidence of sincerity on the part of the Benchers, and of the earnest belief that a combination of forces would not be beneficial. We venture the assertion however that such a combination would not only not be injurious to the Law Society, but would be actually beneficial. It is said that if the students who are members of the Law Society found that they could receive better instruction at the University, they would attend in large numbers, to the injury of solicitors and the loss of the Society. In the first place, if this were true it would betoken a most illiberal and selfish spirit. Illiberal, because it is against the interests of students as a class and the public generally to do or omit to do anything reasonable which

might afford the profession better educational advantages, and provide the public with men better equipped for their professional duties ; and selfish because of the belief that it would entail a sacrifice to encourage the movement.

If the Law Society had at any time shown a deep enough interest in the promotion of study to expend an appreciable portion of its funds for that purpose, one could understand its looking upon a proposed teaching faculty with some degree of jealousy. But its efforts in that direction have been so feeble that one can hardly believe them to be sincere. As it does, we may say, almost nothing in the way of actively providing educational facilities for the students, we cannot wonder at a portion of its true functions being usurped by another body more progressive and more liberal.

That the establishment of such a faculty would involve either a numerical loss of students or a loss of revenue to the Society we deny. This must be so partly from the different nature of the subjects which will be taught at the University. There, the course of study will be jurisprudential, while at Osgoode Hall the curriculum is eminently practical, and is composed entirely of books upon municipal law. The science of law will be taught at the former, while the practice will be taught at the latter. A graduate in law, though better fitted to commence the course of study at Osgoode Hall by reason of his degree, must necessarily pass the examination for admission to practice and call to the Bar, and must serve his time as an articled clerk. That some advantage should be offered to one who has taken a degree in Law is perhaps correct ; but it certainly should not be in the profession of Solicitor but rather in that of Barrister. Hence, all the Society's regulations both as to service under articles and fees would remain unchanged. And as to the Bar, even if graduates in Law were called to the Bar immediately, there is no reason why the usual fee should not be charged. We think that it would be found that the spheres of action of the two bodies are so far apart that no danger would ever exist of their clashing.



Even if it involved considerable expense or loss to the Society we do not see why the aid should not be given. The principle upon which a Society such as the Law Society should be maintained is that those who are now living should get the benefit of their contributions to the common fund. We are now enjoying a very fine portion of the building paid for out of the accumulations of fees paid by our predecessors, and we still have a considerable yearly income derived from accumulations not yet spent. Why we should be taxing ourselves to leave a large amount of savings to posterity cannot be explained. Our successors will enjoy a beautiful building and grounds and a splendid library. Why should we save money for them too? The funds of the Society should be liberally expended on the education of students, and now that the opportunity presents itself of aiding the University in this respect it should not be lost.

That we should have a better Bar if a course of jurisprudence were taken before entering upon the study of municipal law goes without saying. And in this respect the Law Society would gain a distinct advantage. We trust that a more liberal view will be taken of the project and that substantial aid and encouragement will be given it.

#### **British Columbia Reports.**

We have just received from Mr. P. Æ. Irving, Reporter to the Supreme Court of British Columbia, part three of his second volume of British Columbia Reports. They are turned out in their usual creditable style and show careful work on the part of the reporter. This number contains a report of the celebrated case of *Sproule* which afterwards was argued in the Supreme Court of Canada on a motion for a *Habeas Corpus*. There are also several cases on constitutional law, mining cases, several cases in which the Canadian Pacific Railway Company figure, and some cases of minor importance complete the number.

*Regina v. Gold Commissioner of Victoria District* was an application for a writ of *mandamus* to the chief commissioner of lands and works, as gold commissioner of Victoria

District, commanding him to issue to Low Chin, a Chinaman, a free miner's certificate upon payment of \$5. It appears that section 14 of the Chinese Regulation Act, 1884, enacts that "no free miner's certificate shall hereafter be issued to any Chinese except upon payment of \$15." The constitutionality of this enactment was thus directly brought into question. Amongst other points argued, it was urged that the Act interfered with the right of the Dominion to regulate "trade and commerce" and the rights of aliens. But Mr. Justice McCreight rested his opinion upon the same ground as that expressed by Mr. Justice Crease in *Reg. v. Wing Chong*, in the same volume, viz., that the Act in imposing a tax discriminated against the Chinese, and therefore was unequal and unjust. The *mandamus* was accordingly granted, and Low Chin got his free miner's certificate. A similar decision was given by the late Chief Justice Wood in *Hudson Bay Co. v. Attorney-General*, Man. Rep. t. Wood, 209. In that case it was held that an Act which imposed a tax of five cents per acre on the lands of non-residents, while those of residents were taxed to the extent of one cent per acre only, was unconstitutional, as transgressing the fundamental principles of taxation.

*Johnson v. Braden* was a mechanic's lien case. The British Columbia Act follows the Ontario Act, and the decision is interesting mainly on account of the interpretation placed upon the section creating the lien, as to which our Courts have differed. Mr. Justice Walkem is thus reported:—"Objection has been taken to the statement of claim filed by the plaintiffs under sections 4 and 5 of the Act, inasmuch as it omits to state the *kind* of material furnished. I think the objection is a good one, and renders the statement inoperative; but the filing of a statement of claim is not imperative. It in no way creates the lien, nor is it necessary to sustain it. When properly framed and filed, it gives the lien-holder the status of a purchaser to the extent of his lien on the property affected by it; in other words, it further secures the lien; and this further security, together with the costs incidental to it, is all that

the plaintiffs lose by the document being inoperative." It should be stated that this is subject to an action being brought and *lis pendens* registered within the thirty days during which the lien exists. The same opinion has been expressed by Mr. Justice Ferguson, who said, in *Makins v. Robinson*, 6 O. R. at p. 5, "The registration does not create the lien. It is given by the statute." The same opinion was held by Mr. Justice Proudfoot, who dissented from the view that the lien must be registered in order to maintain its priority over a purchaser: *Hynes v. Smith*, 27 Gr. 150. But a different construction has been adopted by the Court of Appeal: *McVean v. Tiffin*, 13 App. R. 1.

In *re Clay & Victoria*, the Court held that as between a saloon-keeper and the municipality which licenses him there is a contractual relationship, and consequently the municipality cannot, pending the license, make any alterations in the conditions or regulations upon which it was granted. Any such alterations must be made at the time of renewing the license.

In *Regina v. Howes* a grand Jury sent their Foreman into Court and asked the presiding Judge (Crease, J.) for the depositions of an absent witness without whose evidence they had no materials to find a bill. His Lordship after referring to *R. v. Bullard*, 12 Cox, 353 and *R. v. Gerrans* 13 Cox, 158, granted the application, stating that the Grand Jury might send for and look at any deposition, and act upon it as they should think proper.

In *Sehl v. Humphreys* the sheriff seized certain goods of the defendant under an execution, and the defendant claimed certain exemptions. His right being established, the question arose, who was to pay the sheriff's costs. The court determined that they were payable by the defendant as his right to the exemption did not arise until he had exercised his option.

#### **Devolution of Estates Act and Possessory Titles.**

The days in which the estate of a disseisor was cast upon his heir are past, and now the succession remains vacant until an administrator is appointed. This raises a

curious question as to the effect of the new enactment upon possessory titles. Under the old law the heir of the disseisor could add his ancestor's possession to his own and claim the benefit of the statute of limitations as against the proper title. But can he do so now?

The Act applies "to all estates of inheritance in fee simple." Is this to be restricted to such estates only as are limited in fee simple? Or does it refer to all inheritable estates. A disseisor, though he has not an inheritance in fee simple while he is a disseisor has yet an inheritable and transmissible interest, "a precarious fee," as Mr. Hayes calls it: 1 Hayes' Conv. 268. "A person who has taken possession of land without title has, while he continues such possession and before the statutory period has elapsed, a transmissible and inheritable interest in the property, though one which is liable at any moment to be defeated by the entry of the rightful owner; and if such person be succeeded in the possession by one claiming through him who holds till the expiration of that period, such successor has then as good a right to the possession as if he had himself occupied for the whole period": Darb. & Bos. 390.

Whether we regard a disseisor's interest as within the Act or not it will be seen that the old doctrine is now inapplicable. At the death of the disseisor intestate, his children, though in possession, do not claim directly from him, assuming for a moment that such an interest is within the Act. They take, if at all, by conveyance from the administrator upon whom the estate devolves. The administrator may or may not be in possession. If he is in possession and the disseisor's interest is within the Act probably his possession will be considered a continuation of that which was broken by the death of the disseisor. Is he then to hold possession in trust for the next of kin? or may he claim his sole possession as enuring to his own benefit? If he is out of possession and the children or some of them are in possession, is there not such a complete break in the possession that the ancestor's possession goes for nothing. The children in possession

do not inherit, and the administrator upon whom, if at all, the interest devolves, is out of possession. Must not the possession of the children then be an entirely new possession commencing from the time of their ancestor's death? And if it is an entirely new possession do they not claim in their own behalf and against the administrator, who is thus debarred from claiming the interest on behalf of the *defunctus*?

Take now the other view, that it is not an estate of inheritance in fee simple. If we grant this at once then it is clear that the law in this respect remains as it was before the Act, and the children take the inheritable interest which their ancestor had, and by retaining possession are enabled to add their ancestor's possession to their own and so claim the whole possession as continuous and bar the rightful owner.

#### **An old Assize Docket.**

We have had sent to us a docket of the cases entered for trial at the spring assizes 1850, which shows that the process of fixing cases for special days and putting others at the foot of the list was as common then as it is now. The docket comprises two hundred and five cases, including several cases in which Her Majesty prosecutes.

Cameron, Brock & Robinson have 21 records, followed by Hawke with 18, Bell & Crowther with 17, J. Duggan with 14, Crawford Hagarty & Crookshank with 13, Wilson & Smith with 11, Morrison Connor & MacDonald with 10, Cayley & Cameron with 7, while the remainder are fairly distributed amongst a number of other firms and attorneys.

Of those who are still practising in Toronto there appear on the docket the names of Messrs. S. Richards, S. M. Jarvis, Crowther, R. B. Miller, McMichael, Gamble, and Durand. Mr. Holland is probably the gentleman who is now Police Magistrate in Port Hope. W. McDougall is, we presume the Hon. Wm. McDougall. The names of Lount, Weller, Van Norman, Burnham, Ball, Tilt and Ewart are familiar to those of the present day, and are no doubt

members of the same families as those who are now practising. The names of Hagarty, Wilson, Morrison, Cameron and Galt are known to all of us as occupants of the Bench, three of whom are still alive. Whether Mr. Justice Proudfoot was a member of the firm of Jones & Proudfoot we cannot say. The late Judge Duggan was then in active practice with a fair number of cases on the docket. And there appear also the familiar names of Eccles, Dempsey, Boulton, Edward Jones, Hector, Crooks, and Sherwood.

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## BOOK REVIEWS.

*The Laws of Insurance: Fire, Life, Accident, and Guarantee.* Embodying cases in the English, Scotch, Irish, American and Canadian Courts. By JAMES BIGGS PORTER, of the Inner Temple and South Eastern Circuit, Barrister-at-Law; holder of the first prizes (1873) in Equity and Real Property. Assisted by WILLIAM FEILDEN CRAILS, M.A., of the Inner Temple and Western Circuit, Barrister-at-Law. Second edition. London: Stevens & Haynes. 1887.

For a book of its size this work will be found one of the most useful books on the Law of Insurance, as well on account of its dealing with so many branches of the law as on account of the numerous citations of cases from different jurisdictions. It should be peculiarly acceptable to practitioners in this Province on account of the collection of Ontario cases which have been interwoven into the text.

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REVIEW OF EXCHANGES.

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*Central Law Journal.*—4th February, 1887.

**Power of Corporation to remove Directors for cause**, by WILLIAM E. TALCOTT. Amotion signifies the removal of an officer of a corporation. Disfranchisement is the expulsion of a private member. Minor officers may be removed without cause but not directors. After a review of authorities, the learned writer thus concludes:—"First. A corporation has the power, unless otherwise provided in its charter, to remove its directors for cause. Second. Such cause must be reasonable and sufficient and is so when it consists of either (1) the commission of an infamous offence, or (2) a violation of official duty so gross as to amount to breach of the tacit condition annexed to the office, or (3) an offence constituting not only a breach of official duty, but also matter indictable at common law. Third. This power of amotion must be exercised by the corporation itself, and due notice of the charges against him and reasonable opportunity for answering the same, must be given to the director sought to be removed. Fourth. The amotion, if authorized and regular, terminates such director's right to his office, but does not affect his franchise as a member, or other right in or against the corporation. Fifth. If the amotion is unauthorized or irregular he is entitled to be restored to the office by *mandamus*.

*Ibid.*—11th February, 1887.

**Municipal Liability for defective Sewerage**, by FRANCIS H. CLARK. A distinction is drawn between liability for ministerial acts, and for acts done or omitted in the exercise of legislative discretion. Hence a municipality is not liable for wholly omitting to make any provision for drainage; but it is liable for failure to perform or for the improper performance of ministerial acts. When a public improvement is entered upon its duties cease to be discretionary and become ministerial. A municipality may not maintain or permit a nuisance; and its duty is to repair when it has notice of the defect.

*Ibid.*—18th February, 1887.

**Liability of Joint Executors**, by S. G. CROSWELL. The subject is presented under the following questions:—"First, has the executor whom it is sought to charge for the other's default ever had the possession of the



assets in question? Second, if he has had possession, and has delivered them over to another executor, what reason had he for doing so? If he has not had possession, did he know of the misappropriation by the other executor?" If the executor never had possession he is not responsible unless he knew of the misappropriation or was negligent in not knowing. But if the property comes into his possession and is then put by him into the possession of his co-executors he becomes liable for misappropriation by the latter.

*Ibid.*—25th February, 1887.

**Judicial Control of Public officers**, by W. F. ELLIOTT. American cases are cited showing that public officers are not controllable by judicial officers.

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by A. in trust for B. (c). Nor could an equity of redemption be extended under an *elegit*; for to take one half the land would be to oust the mortgagee therefrom, while he was entitled to it by conveyance of the legal estate. A prudential reason was added, which is now without weight, namely, that a purchaser of an estate "attended with equities of a peculiar kind, arising from circumstances which neither he nor the sheriff can know, and over which the Court of law issuing the process can have no control, would be in a most unsatisfactory position; and it would be highly to the prejudice of the mortgagor that his equitable estate should be forced from him under a legal process, at the price that a stranger might think it prudent to give for it under such disadvantage." Then the statute was dealt with which governs the right to execution against lands, 5 Geo. II. cap. 7. By that statute it was provided that lands should be "subject to the like remedies, proceedings and process in *any court of law or equity* for seizing, extending, selling or disposing of them, as personal estates are subject to, in the same colonies, for payment of debts." As to this, it was said that the legislature contemplated sending the parties either to law or equity, according to the nature of the interest to be made liable, and thus preserved the subject from confusion. For these reasons it was held that an equity of redemption could not be reached by common law process.

Following this is a case in which a curious point arose. The owner mortgaged to an alien, and subsequently judgment was signed and executions issued on it against the land, and it was argued that the estate did not pass to the alien and therefore the execution bound the land. But the Court held otherwise (d).

It has also been said that it is doubtful whether an equity of redemption in a term was saleable by common

(c) See *Doe d. Hull v. Greenhill*, 4 B. & Ald. 684; *Simpson v. Smyth*, 1 E. & A. 44.

(d) *Doe dem. Richardson v. Dickson*, 2 O. S. 292. See also *Walton v. Bernard*, 2 Gr. 344, where execution went against the executors of a mortgagor.

law process (e). But it appears from other authorities that it is not. Referring to the Statute of Frauds it was said in *King v. Ballet* (f) that if a man be *cestui que trust* of a term, it is not assets within the statute; for the statute extends only to a trust of land in fee. So in *Lyster v. Dolland* (g) it was said that the statute by its reference to seisin showed that it referred only to freeholds, and therefore that an equitable term could not be taken in execution. Other authority is to be found to the same effect (h), and the law has not been changed in that respect (i).

That being the state of the law an Act was passed in the twelfth year of the reign of Queen Victoria, which is now embodied in the Execution Act (j) by which it was declared that "the sheriff or other officer to whom any writ of *fiери facias* against the lands and tenements of any mortgagor of real estate, is directed, may seize or take in execution, sell and convey (in like manner as any other real estate might be seized or taken in execution, sold and conveyed,) all the legal and equitable interest of such mortgagor in the mortgaged lands and tenements." Notwithstanding this enactment the interest of a mortgagor in a term of years cannot be sold (k). The Act applies to freeholds only.

Not long after this Act was passed it was held that as the mortgagor alone was named in the enactment it could not be extended in its operation beyond him, and so when the estate descended and process was issued against the administrator the equity of redemption could not be sold (l). This construction of the Act caused an amending, or rather as it was held, a declaratory Act, which in its preamble recited that doubts had arisen concerning the construction of the

(e) *McDonald v. Reynolds*, 14 Gr. at p. 692.

(f) 2 Vern. 248.

(g) 1 Ves. 431.

(h) *Scott v. Scholey*, 8 East 486; *Doe dem. Webster v. Fitzgerald*, R. & J. Dig. 1429.

(i) *Re Duke of Newcastle*, L. R. 8 Eq. 700.

(j) R. S. O. cap. 66, sec. 35 et seq.

(k) Leith R. P. Stat. 357.

(l) *Bank of U. C. v. Brough*, 2 E. & A. 95; *Lowell v. Bank of U. C.*, 10 Gr. 57.

Act, and declared that "wherever the word 'mortgagor' occurs in the said sections, it shall be read and construed as if the words 'his heirs, executors, administrators or assigns, or person having the equity of redemption' were inserted immediately after such word 'mortgagor' (m)." In *McEroy Clune* (n) it was held by a majority of the Court of Chancery, Proudfoot, V.C., dissenting, that the Act as aided in its construction by the preamble, was merely declaratory of what the meaning of the old Act was and should have had attributed to it, and therefore that it was retrospective in its operation.

In the revision of the statutes in 1877 that part of the amending Act which has been quoted was omitted, and only the following portion retained: "The equity of redemption in any freehold mortgage of real estate shall be saleable under an execution against the lands and tenements of the owner of such equity of redemption in his life time, or in the hands of his executors or administrators after his death, subject to such mortgage, in the same manner as any lands and tenements can now be sold under an execution at law (o). Attention is to be directed to the words "owner of such equity of redemption," because in *Bank of U. C. v. Brough*, it was pointed out that a person might purchase land subject to a mortgage and afterwards have execution issued against him in which case his equity of redemption would not (according to the then interpretation of the law) be saleable, because, though the owner of the equity he would not be the mortgagor. It is therefore important to note that however the debtor may have become entitled to the equity of redemption, whether by purchase or by his own creation, it is subject in his hands to execution issued against his lands.

In order that an equity of redemption may be saleable under this Act, it must clearly appear on the face of the instrument, that is, it must appear by the construction of

(m) 27 Vict. cap. 13, sec. 1.

(n) 21 Gr. 515.

(o) R. S. O. cap. 66, sec. 33 (2).

the instrument itself, and apart from extrinsic evidence that the debtor has the right to redeem (*p*). Hence, when a conveyance has been made, which is absolute in form, but with the intention of making it operate as a security only, the interest of the grantor is not the subject of common law process.

The sheriff can only sell the interest which the debtor had in the lands at the time the writ was placed in his hands as well as at the time of the sale (*q*). The effect of this was discussed in a case in which a registered judgment creditor issued a writ and bought thereunder. His judgment as registered had priority over a subsequent mortgage, and he claimed to be redeemed as to his judgment by the subsequent mortgagee. But this was denied him. He being the owner of the land could not claim to be redeemed by one whom in turn he was obliged to redeem under the statute. The sheriff was entitled to sell only the interest of the debtor in the land at the time of receiving the writ, and as this interest was what remained after satisfaction of all prior liens, the purchaser as a lien holder was considered to have bid over and above his own and other claims the price of the residue (*r*). This will be dealt with further in considering the effect of the sale.

Whether or not a mortgagee can sell the equity of redemption under process issued on a judgment on the covenant in his mortgage has been doubted, though there is sufficient material in the statute for building a doctrine in his favour. The statute runs, "any mortgagee of lands and tenements so sold, or the heirs or assigns of such mortgagee (being or not being plaintiff or defendant in the judgment whereon a writ of *fiери facias* under which such sale takes place has issued), may be the purchaser at such sale, and shall acquire the same estate, interest and rights thereby as any other purchaser, etc.' (*s*). In *Van Norman*

(*p*) *McCabe v. Thompson*, 6 Gr. 175; *McDonald v. McDonell*, 2 E. & A. 393; *Fitzgibbon v. Duggan*, 11 Gr. 188; *Paul v. Ferguson*, 14 Gr. 230.

(*q*) R. S. O. cap. 66, sec. 36.

(*r*) *Pegge v. Metcalfe*, 5 Gr. 628.

(*s*) R. S. O. cap. 66, sec. 37.

*v. McCarty (t)*, Mr. Justice Gwynne pointed out what he considered to be an anomaly which would result from the mortgagee so buying. The doubt is so forcibly expressed that it is worth transcribing the words of the learned Judge, "For myself, I confess, I have always entertained and still do entertain doubts that, consistently with the provisions of the statute, the equity of redemption can be sold upon an execution at law issued upon a judgment recovered at the suit of the mortgagee, in the action upon the covenant contained in the mortgage for payment of the mortgage debt. There has always appeared to me to be something so inconsistent as to be impracticable in the law permitting money to be levied under an execution issued upon a judgment, which money is not payable to the judgment creditor; while the operation of the sale, by means of which it was levied, is to nullify the judgment without satisfying it, leaving the judgment creditor a mortgagee still, but stripped by his own act of the benefit of the covenant contained in his mortgage, and of the judgment which he had recovered thereon. A case like this could readily be suggested wherein the mortgagee, placed in a worse position than he had been before his action at law, would be compelled after all to have recourse to a court of equity to permit him to foreclose the equity of redemption against the purchaser under the execution issued upon his judgment, as the only means of extricating himself from the embarrassing position in which he had placed himself by the mode which he had adopted of enforcing his judgment. The words in the 259th section [37th of the Revised Statute] '*being or not being plaintiff*,' etc., may receive a construction quite consistent with the provisions of the Act, if they should be limited in their application to the case of the mortgagee recovering a judgment against the mortgagor in *in respect of a matter other than the mortgage debt*, and so the anomalies and contradictions I have suggested may be avoided." No opinion on this point was expressed by the other members of the Court and it was not necessary for

the disposition of the case. Hagarty, C.J., guarded himself against "throwing any doubt upon an application of the statute which has prevailed for many years, and on which probably very many titles depend." The dangers pointed out by Gwynne, J., are (1) the inconsistency of levying money not to be paid to the judgment creditor, (2) the nullifying of the judgment without satisfying it, (3) the consequence being to leave the mortgagee a creditor without the benefit of the covenant or of the judgment recovered thereon, and (4) where a stranger buys, the necessity the mortgagee would be under of foreclosing him. With great respect for the learned Judge his argument cannot be accepted as convincing. First, the money levied is paid by the judgment creditor, as purchaser, to the sheriff; but the amount so paid is considered as the surplus of his bid over and above the mortgage debt which is assumed to be part of his bid. Thus, if a mortgagee having a mortgage debt of \$1,000, bid \$500 for the equity of redemption, his bid would be assumed to be \$1,500, of which \$500, the surplus over and above what would be sufficient to satisfy the judgment would go to the mortgagor (u). Hence, although he really receives no money payment on his judgment but rather pays out money he receives its equivalent in the mortgagor's estate. His position is the same as if he had paid to the sheriff in money the whole amount and received back thereout his mortgage debt. Secondly, it cannot be said that the judgment is made null by the sale without its being satisfied; for the statute declares that when the mortgagee buys "he shall give to the mortgagor a release of the mortgage debt." He must consequently give a release of the judgment; and so the judgment is satisfied by the sale. This was determined in *Woodruff v. Mills* (v) where Robinson, C.J., said that "the effect of the statute in that case [purchase by the mortgagee] would have been to work a satisfaction of the debt, and to compel us to regard the mortgage as satisfied." The position of the mortgagee would then be that he

(u) *Woodruff v. Mills*, 20 U. C. R. 57.

(v) 20 U. C. R. 51.



would acquire by purchase through the medium of the sheriff the equity of redemption, and would at the same time have satisfied the judgment by his bid at the sale. Thirdly, the mortgagee, as a consequence of this proceeding, would not be a creditor, by consequence would not be a judgment creditor, and being obliged to release the mortgage debt would by so doing release the covenant in the mortgage. Fourthly, where a stranger buys the equity of redemption, it is true that the mortgagee would have to foreclose him. He is bound to give a release of the mortgage debt, but not absolutely. He is to give it to the mortgagor, but the land remains charged with the mortgage debt, or as much of it as remains after crediting the proceeds of the sale. It therefore appears that the provisions of the statute may be worked out, and there is no such difficulty or anomaly produced by attempting to work it out in that way as to lead to the belief that it was not intended to apply to the case of a mortgagee selling on a judgment recovered on the covenant in the mortgage. Take now the case suggested by the learned Judge for the application of the statute. The mortgagee having a judgment for a debt apart from the mortgage sells the equity of redemption and himself buys. Why should he be obliged to release the mortgagor from the covenant which did not enter into the calculation at all? Why should he be considered (as was said in *Woodruff v. Mills*) as bidding the amount of his mortgage debt when he is buying under a judgment for another debt? If he buys under a judgment for another debt, then according to the terms of the statute he must release the mortgage debt. The result of this is that if a mortgagee, who is also judgment creditor for another debt of the mortgagor, buys the equity of redemption at the sheriff's sale, he is bound to take the land for his mortgage debt *plus* the amount bid for the equity under his other judgment, a result which would seem to indicate that such a course was not contemplated by the Act. Indeed, in many cases the result where there was a small margin for the mortgage would absolutely preclude the mortgagee from bidding, instead of enabling him to do so. In *Wood-*

*ruff v. Mills* the very question of purchase by the mortgagee under a judgment on his mortgage was the subject of a demurrer, and no doubt appears to have entered the mind of that distinguished judge, Sir J. B. Robinson, who delivered the judgment of the Court.

Where a mortgagee bid at a sale of the equity of redemption under a writ issued by a judgment creditor of the mortgagor, but the sale was inoperative because the mortgage was absolute in form, it was held that he could not add to his mortgage debt the amount so bid by him (*w*). Vankoughnet, C., said, "He did not pay it at the request of the mortgagor. He paid it to the creditor of the mortgagor, or to the sheriff for him, on a proceeding *in invitum*. What right had the mortgagee to pay money for the mortgagor without his request? or if he did pay for it at his request, how could he charge it on the land without an agreement with the mortgagor therefor?"

It has been held, however, that an equity of redemption cannot be sold on garnishee process issued by a creditor of the mortgagee against the land of the mortgagor. Mr. Justice Gwynne, in *Van Norman v. McCarty* (*x*) said, "Three garnishment executions have issued at the suit of three several creditors of the mortgagee, for the purpose of realizing payment of the mortgage debt to themselves instead of to the mortgagee. Professing to attain this purpose the sheriff, in virtue of one or all of these executions has assumed to sell and convey the equity of redemption in the mortgaged premises. He has realized from the sale \$35. The sum so realized forms no part, nor can it represent any part, of the mortgage debt. The 27 Vict. cap. 13, says distinctly that the sale which the statute authorizes should be a sale *subject to the mortgage*. The amount, therefore, which has been realized by the sheriff, if the sale were valid, should of right be paid over to the mortgagor, as the value of his estate, in excess of the mortgage, leaving the *purchaser*, as contemplated by the statute,

(*w*) *Paul v. Ferguson*, 14 Gr. 230.

*x* 20 C. P. at p. 46.

to pay the mortgage debt ; but the statute gives no process against the purchaser to enforce payment of that debt, except at the suit of the mortgagor, in the event of his being compelled by the mortgagee, notwithstanding the sale, to pay the mortgage debt out of other property. The effect then of executing the garnishment process upon the equity of redemption would be to realize a sum of money not part of, but in *excess* of the mortgage debt, not payable to the person suing out the execution under which it was levied, but to the defendant in the action against whose estate the writ had issued, and to transfer the liability to pay the mortgage debt to levy which the writ was issued, to another person, namely the purchaser of the equity of redemption, against whom the creditors of the garnishee can have no process ; to defeat in fact, and not to enforce the remedy, for the enforcing of which the writ issued."

The effect of the sale is to "vest in the purchaser, his heirs and assigns all the legal and equitable interest of the mortgagor therein at the time the writ was placed in the hands of the sheriff \* \* and to vest in such purchaser, his heirs and assigns, the same right as such mortgagor would have had if such sale had not taken place." As against the mortgagor, therefore, the purchaser is entitled to maintain ejectment (*y*). With respect to the mortgage debt, where the equity of redemption is sold under a judgment recovered on the covenant in the mortgage, it is reduced only by the amount which is produced by the sale if a stranger buys. It does not release the mortgagor. But the purchaser is bound to protect the mortgagor against any action by the mortgagee. And if the mortgagee enforces payment by the mortgagor the latter may recover against the purchaser, and till recovery has a lien upon the land for the amount paid by him. So it has been held that a purchaser cannot keep alive a mortgage which he pays off as against a subsequent mortgage, he being bound to pay off both (*z*).

(*y*) *Fisken v. McMullen*, 12 C. P. 85.

(*z*) *McDonald v. Reynolds*, 14 Gr. 691.

Since this decision *The Conveyancing and Law of Property Act, 1886*, has been passed, by section 7 of which it is declared that, "where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of giving a certificate of payment or re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall by virtue of this Act be bound to assign and convey accordingly." No doubt the case in question was not in contemplation when this clause was passed; but it does not seem to affect the law as previously interpreted. There is no obligation on the part of the purchaser to pay the mortgage except to the mortgagor when he is sued. It is true that he is entitled to redeem within the meaning of the statute, but he is not entitled to a re-conveyance. Jessel, M.R., in speaking of this clause said, "where there are first and second mortgagees, and the first mortgagee has notice of the second, when he is paid off he becomes a trustee of the legal estate for him. The word 'reconvey' is the proper word to use; it is strictly a reconveyance. If the first mortgagee is paid off by the mortgagor, he is not bound to reconvey the estate to him; but if he is paid off by the second mortgagee he is bound to reconvey it to him (a)." It has also been said that the purchaser could only keep alive such a mortgage at the expense of a duty which he owed to the mortgagor, and the court would not at any rate presume an intention to do what was wrong (b).

Nor will such a sale release a surety for the mortgagor. Thus, where Clark mortgaged to the Edinburgh Life Assurance Company and covenanted to pay the mortgage money, and Stewart covenanted by a separate instrument to pay the mortgage money if Clark did not, the latter made default, and the company recovered judgment against Clark on the covenant. At a sale under execution issued

(a) *Teeran v. Smith*, L. R. 20 Ch. D. at p. 729.

(b) *McDonald v. Reynolds*, 14 Gr. at p. 694.

thereon a stranger bought ; and afterwards Stewart being called upon to pay the balance under his covenant paid the amount and sued Clark therefor, and he was held entitled to recover (c).

But when the mortgagee buys he is bound under the Statute to give a release to the mortgagor of the mortgage debt. In *Woodruff v. Mills* (d), it was said, in speaking of the rights of a mortgagee who buys under an execution to recover on the covenant in his mortgage, "we think he could not, for that the effect of the statute in that case would have been to work a satisfaction of the debt, and to compel us to regard the mortgage as satisfied. We incline to the opinion that the defendants might in such an action have pleaded payment, for the intention of the legislature we take to be, that when the legal holder of a mortgage buys the equity of redemption at a sheriff's sale, he is to be looked upon as having bid the sum which he did as a sum which he was willing to give above the debt for which he held a charge upon the land ; in other words, that he bid the amount of the incumbrance which he held, and so much over, and that, therefore, when he receives a conveyance of the equity of redemption his debt is paid. \* \* The provision of the Act is only that the mortgagee so buying the equity of redemption on an execution, shall give to the mortgagor a release of the mortgage. It does not say in words that the debt shall be regarded or treated as satisfied, but surely that must be understood as included in the provision, or why should the mortgagee be compelled to give a release of the debt ? The exacting of a release is a mere consequence ; it is carrying the provision further in order to free the estate ; but the provision can only be looked upon as founded on the principle that the purchase by the mortgagee amounts to satisfaction."

When a purchaser under a void writ paid off a mortgage and took and registered a statutory discharge, which recited that the mortgagor (the execution debtor) had paid the mortgage money, and the sheriff's sale was afterwards

(c) *Stewart v. Clark*, 13 C. P. 203.

(d) 20 U. C. R. at p. 57.

declared void (e) on account of the invalidity of the writ, the Court of Chancery restrained the original owner from ejecting the purchaser, on the ground that by mistake he had taken a discharge when as a matter of right he was entitled to a conveyance of the legal estate (f).

The application of this enactment has necessarily been somewhat restricted on account of the peculiarity of the equitable rights of the mortgagor. Thus, the sheriff must sell "the equity of redemption in any freehold mortgage of real estate," to use the words of the statute and not a portion of the lands mortgaged. "The plain construction then," says Gwynne, J., "of the 257th section of 22 Vict., is that it is the equity of redemption in the mortgaged premises, that is, the whole estate known in courts of equity as the equity of redemption, which alone may be sold upon a judgment against the owner thereof, and not that that estate may be divided into, and sold in parcels, thereby creating complications embarrassing to a court of equity in its dealings with this creature of its own creation (g)." And the learned judge put the following case as illustrative of the impossibility of allowing a portion of the mortgaged land to be sold. A mortgagor who is bound to pay his mortgage debt by ten annual instalments sells one half of the mortgaged premises in ten lots to ten purchasers, the consideration in each conveyance being that the grantee is to pay the mortgagee one of the instalments as it matures. Assume then that the half retained, viz., the mortgagor's, is sold under process. The purchaser would be entitled to compel the ten purchasers to liquidate the mortgage so as to relieve his portion from all liability for the mortgage debt. "The statute," says the learned Judge, "clearly never contemplated that a sale under it should pass such rights. It expressly provides that the sale which it authorizes shall pass to the purchaser the liability of paying off the mortgage debt in full." So in *Heward v.*

(e) *Lee v. Howes*, 30 U. C. R. 292.

(f) *Howes v. Lee*, 17 Gr. 459.

(g) *Van Norman v. McCarty*, 20 C. P. at p. 44.

*Wolfenden* (h) it is said, "Now, the mortgagor's right, unaffected by a sale of his interest, is to have all the lands conveyed to him absolutely by the mortgagee, on payment of the charge upon them. Suppose, then, the mortgage embraces several lots of land, and the sheriff sells as here, the equity of redemption in one of them, is the purchaser of that interest only, to be entitled to call upon the mortgagee, upon payment to him of the charge upon the whole lands, for the conveyance of all those lands, freed from the equity of redemption therein of the mortgagor, though the purchaser only bought, and the sheriff only sold, the equity of redemption in one of the lots? That one lot may have been worth more or less than the whole debt. In either case there would be the at all events apparent absurdity and the difficulty that, while the sheriff was only selling the mortgagor's estate in one lot, the purchaser would thereby actually acquire the estate of the mortgagor in all the other lots mortgaged; for if such a sale passed anything, the purchaser must under the statute have this right. The sale of the mortgagor's interest in an acre of one thousand acres mortgaged must then give the purchaser this right, however small the sum be paid, and thus deprive the mortgagor of the power of redeeming the 999 acres, however much more valuable than the debt they may be. The Legislature did not, I think, intend this, and the language employed by them justifies me in avoiding such a result. Section 259 leads also to the same conclusion, and it gives the mortgagor a charge upon the mortgaged lands against the purchaser of the equity of redemption, until the mortgage debt be paid. The lands spoken of here are the mortgaged lands, as in section 257, and I do not think that while the Legislature meant that the purchaser was to acquire the whole of the mortgaged lands that the sheriff might sell, they also meant that he might obtain the whole by the actual sale of only a part, however small, as in effect he must do, if the appellant's argument here be right; for if the sale passed anything it passed the mortgagor's right in the whole of the mortgaged lands." We might call

(h) 14 Gr. at p. 191.



attention more clearly to a point hinted at in this extract. That is that the purchaser being bound to pay the whole mortgage debt the mortgagor could, if a sale were made of a part, call upon the purchaser to pay the whole mortgage debt. The result would be to shift the whole mortgage debt upon the part sold, a result quite foreign to the purpose of the statute. So if the mortgagee himself bought, as he may do, and acquired a portion only of the mortgaged land he would be bound to release the whole mortgage debt. Clearly then, the sheriff can sell only the equity of redemption as a unit (i).

The necessary construction of the statute is productive of other results. Thus, when lands lying in two counties are embraced in one mortgage, neither sheriff can sell, for neither can sell the whole equity of redemption and the writs are therefore inoperative (j). So where tenants in common mortgage their estate, and subsequently an execution issues against one of them, it will not affect his share for the reasons already stated, namely that it must be the whole equity of redemption that is sold (k). But where tenants in common severally mortgaged their interests to the same person and he afterwards recovered judgment against all on a note and issued execution, it was held that their equity could be sold thereunder (l).

Where there are two mortgages upon the same land in different hands it has been held that the statute does not apply (m). For if one of the mortgagees were to buy he would be bound only to release his own debt, while the other mortgage would remain a subsisting liability which might be enforced against the mortgagor. But if a stranger bought he would be bound to pay off both mortgages for the protection of the mortgagor. The intention of the statute then being that on a sale of the mortgagor's interest he should be forever discharged from liability on the mort-

(i) See also *Shaw v. Tims*, 19 Gr. 496.

(j) *Heward v. Wolfenden*, 14 Gr. at p. 190.

(k) *Cronn v. Chamberlin*, 27 Gr. 551.

(l) *Rathbun v. Culbertson*, 22 Gr. 465.

(m) *Donovan v. Bacon*, 16 Gr. 473, n.



gages (n), and the result not being capable of accomplishment when there are two mortgages it was held that the case was not within the statute. This case was followed in *Wood v. Wood* (o) where a portion of the land comprised in one mortgage was contained in another mortgage held by a different mortgagee. And where a second mortgagee of land obtained judgment and execution on the covenant in his mortgage, and then filed a bill for equitable execution against the equity of redemption in the mortgaged premises, he obtained a decree on the ground that he could not sell the mortgagee's interest under common law process (p).

The difficulty of working out the statute where there are two mortgages in different hands is more apparent than real. And in *Samis v. Ireland* (q) doubt was thrown on the authority of *Donovan v. Bacon* on this point. There is no difficulty whatever when a stranger buys; because he purchases the mortgagee's right to redeem, and can as effectually protect him against two mortgages as against one. If one of the mortgagees buys he must release his mortgage debt. He cannot release the other mortgage debt, but in his capacity of purchaser he becomes liable under the statute to indemnify the mortgagor against the mortgage, and as owner of the equity of redemption discharged of his own mortgage he becomes liable to pay off the outstanding mortgage if he would escape foreclosure. There is therefore no such difficulty in working out the statute as there is in such cases as *Heward v. Wolfenden* and *Cronn v. Chamberlin*, and upon a re-consideration of this point it is most likely that the writ would be held to be operative in such a case.

Where the mortgages are in the same hands the statute is applicable, and the writ will be operative (r).

If the writ will not attach as in the cases cited, the question arises whether it is necessary for a purchaser of such an

(n) *Samis v. Ireland*, 28 C. P. at p. 484, per Galt, J.

(o) 16 Gr. 471. See also *Re Keenan*, 3 Ch. Ch. 285.

(p) *Kerr v. Styles*, 26 Gr. 309.

(q) 4 App. R. at p. 123.

(r) *Donovan v. Bacon*, 16 Gr. 473, n.; *Rathbun v. Culbertson*, 22 Gr. 465.



## EDITORIAL REVIEW.

**Fraudulent Judgments.**

The case of *Woodruff v. McLennan*, 14 App. R. 242, is somewhat remarkable, as it is an instance, somewhat rare, of an action on a judgment being defended on the ground of fraud in obtaining the judgment from a foreign court, by falsely swearing to a state of facts known to be untrue; and as it is an instance equally rare of a refusal to follow the decision of the Court of Appeal in England.

The case of *Abouloff v. Oppenheimer*, L. R. 10 Q. B. D. 295, was relied on for the defence. In that case the plaintiff sued for the return of goods alleged to be in the possession of the defendants, and recovered judgment in a Russian Court. In an action on the judgment in England the defendant set up that the judgment was obtained by fraud in representing to the Russian Court that the goods were not in the possession of the plaintiff, while as a matter of fact they were in his possession and concealed by him. This defence was demurred to and the demurrer was overruled. In *Woodruff v. McLennan* it was sought to distinguish this case from the one before the Court, on the ground that in the English case, as the facts of the defence were necessarily admitted on the demurrer, the Court had no other course open to them than to over-rule the demurrer on the ground that there was an admission that the facts were not as found by the judgment. If the accident of the demurrer had not happened there would have been no admission of fraud, and the plaintiff might have gone to trial relying on the rule that a party shall not succeed merely because he proves the facts set up in his pleading. The same case would thus have arisen that was presented

to our Court, namely, whether the defendants would have been at liberty to adduce evidence of the alleged fraud. According to *Woodruff v. McLennan* that course would not have been open to them. But from a perusal of the judgments one can hardly imagine that such would have been the result.

Again, if the plaintiff had gone to trial after the demurrer was over-ruled, the question would (if the case is properly explained as suggested) still have been open whether the defendant could have given evidence of the fraud. There was nothing to prevent this course. And there was nothing to conclude either party as to their rights at the trial if the explanation of the case by our Court of Appeal is right. If right, then the plaintiff might have proved his judgment and the defendant could not have set up the fraud. The consequence is that a plaintiff may admit fraud, but the defendant may not prove it. We must arrive either at that conclusion or at the conclusion that over-ruling a demurrer means nothing, if that is the proper explanation of *Abouloff v. Oppenheimer*. For it means nothing if it simply means that it was not a case for demurrer. A demurrer is a test of the validity in point of law of the pleading demurred to. In many cases the pleading is so clearly wrong that it may be struck out as forming no defence to the action. Where the line should be drawn between proper cases for so moving and proper cases for demurring it is difficult to say. But if we may assume that the point was so well settled that a Judge in Chambers might have struck out the defence of fraud as clearly bad, then we should have had the unquestionable issue fairly presented, whether it was admissible to plead as the defendant did in the English case. One cannot well avoid the conclusion that upon such a motion the defence would have been maintained. The whole scope of the judgments shows this, and it is more than once stated that that was the question to be determined. In that event it would have been impossible to support or explain the case on the ground that the admission of fraud by the plaintiff in obtaining the judgment was a sufficient reason for maintaining the defence.

The effect to be attributed to a demurrer over-ruled is that the opposite pleading discloses either a good cause of action or a good cause of defence. A plaintiff in demurring to a defence must frequently admit a state of facts inconsistent with his own pleading, and yet that would not be a sufficient ground for over-ruling the demurrer; nor would it prevent the plaintiff from proving his pleading afterwards. If we are correct in this, then *Aboulff v. Oppenheimer* must be regarded as an abstract authority for pleading fraud to an action on a foreign judgment by misleading the court with false evidence.

The explanation offered of the English case seems to show that but for the supposed distinction it would have been of sufficient weight to have turned the scale. But in the judgment of Mr. Justice Burton it is distinctly stated that our Courts, though bound to respect the decisions of the English Courts for their learning, are not bound to follow them if there is a clear opinion of their incorrectness. In matters of purely local significance, apart from the authority of statutes, the English rule of law must necessarily be inapplicable in many cases; but in questions of abstract right, especially in matters which approach so near to the domain of jurisprudence as the one before us, we venture to entertain a strong opinion that the old statute is still unrepealed, which enacts that from and after its passing "in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England, as the rule for the decision of the same."

#### **Delay in the Court of Appeal.**

The Court of Appeal recently sat and adjourned without doing anything, as no one was ready to proceed. The result is that with a respectable amount of arrears on hand a new sitting with half a hundred new cases shortly opens.

With a very evident desire to accommodate the counsel who are engaged to appear before the Court, the Court of Appeal has produced a state of affairs which is unsatisfactory to the Bar, unprofitable to suitors, and consequently

is not creditable to the administration of justice. We say it with all respect to the Court, whose evident desire is merely to consult the convenience of counsel.

It is unsatisfactory to the Bar, because the well known wish of the Court to accommodate the counsel who are engaged before them is sometimes taken advantage of by gentlemen who have other engagements. It is only natural that gentlemen who know that one Court will wait for them while another will not, should keep their engagements with the latter and rely on the good-nature of the former. So appeal cases are practically argued when there is nothing else of importance on hand and both counsel are free to attend. This period may be postponed indefinitely, and seldom if ever does it occur during the period for holding the Assizes and Chancery Division Sittings. It must be extremely unsatisfactory for counsel to be dependent on each other. When one is ready another may not be.

It is unjust also, as well as unsatisfactory to the whole Bar, with the exception of perhaps half a dozen leaders. These are able to retain their briefs and keep other engagements, while, if the cases were called as the Court was ready to hear them, they would be obliged to give up either one brief or the other to another counsel. The practical result of this is that a few, very few, men are able to monopolize the business on the circuits, while, their briefs being saved for them in the Court of Appeal, they enjoy a comfortable monopoly there as well.

It may be said that the Court of Appeal prefers to hear the best counsel, and that whether they prefer to hear them or not it is well that the best counsel should argue the appeals. Very true, and there would be no objection to such an arrangement if the best Counsel left other business to attend the Court of Appeal; and this they would necessarily do if obliged to. If the practice were adopted and strictly adhered to of requiring two counsel to be retained in every case in the Court of Appeal, and if it were made a strict rule that a case when called should be proceeded with, then one of the two counsel must needs be present, the business would go on with regularity, and the Bar would receive

their share of business more evenly distributed than at present. How the younger members are going to learn their profession with no employment and no prospect of any is a problem, and what the standing of the Bar will be under this system when the few leaders are gone is something that is worth considering.

Such a system, if system it can be called, is unprofitable to suitors, for it produces exasperating and injurious delays, and reflects in their minds upon the administration of justice generally.

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## SUPREME COURT OF CANADA.

## General Order No. 83.

Whereas by "The Supreme and Exchequer Courts Act," sec. 109, as amended by chap. 16 of the Act passed in the 51st year of Her Majesty's reign intituled "An Act to amend 'The Supreme and Exchequer Courts Act' and to make better provision for the trial of claims against the Crown," it is provided that the judges of the Supreme Court, or any five of them, may, from time to time, make general rules and orders for certain purposes therein mentioned, and among others for empowering the Registrar to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same, as by virtue of any statute or custom, or by the practice of the Court, was at the time of the last mentioned Act, or might be thereafter, done, transacted, or exercised by a Judge of the Court sitting in Chambers, and as might be specified in such rule or order. It is therefore ordered :—

1. That the Registrar of the Supreme Court of Canada be and he is hereby empowered and required to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same, as by virtue of any statute or custom, or by the practice of the Court, was at the time of the passing of the said last mentioned Act, and is now, or may be hereafter, done, transacted, or exercised by a Judge of the said Court sitting in Chambers, except in matters relating to :—

(a.) Granting writs of *habeas corpus* and adjudicating upon the return thereof.

(b.) Granting writs of *certiorari*.

2. In case any matter shall appear to the said Registrar to be proper for the decision of a Judge, the Registrar may



refer the same to a Judge, and the Judge may either dispose of the matter, or refer the same back to the Registrar with such directions as he may think fit.

3. Every order or decision made or given by the said Registrar sitting in Chambers shall be as valid and binding on all parties concerned, as if the same had been made or given by a Judge sitting in Chambers.

4. All orders made by the Registrar sitting in Chambers are to be signed by the Registrar.

5. Any person affected by any order or decision of the Registrar may appeal therefrom to a Judge of the Supreme Court in Chambers.

(a.) Such appeal shall be by motion, on notice setting forth the grounds of objection and served within four days after the decision complained of, and two clear days before the day fixed for hearing the same, or served within such other time as may be allowed by a Judge of the said Court or the Registrar.

(b.) The motion shall be made on the Monday appointed by the notice of motion, after the expiry of the delays provided for by the foregoing sub-section, or so soon thereafter as the same can be heard by a Judge, and shall be set down not later than the preceding Saturday in a book kept for that purpose in the Registrar's office.

6. For the transaction of business under these rules, the Registrar, unless absent from the city, or prevented by illness or other necessary cause, shall sit every juridical day, except during the vacations of the Court, at 11 a.m. or such other hour as he may specify from time to time by notice posted in his office.

October 17th, 1887.

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## BOOK REVIEWS.

*Government in Canada.* The principles and institutions of our Federal and Provincial Constitutions. The B. N. A. Act, 1867, compared with the United States Constitution, with a sketch of the constitutional history of Canada ; by D. A. O'SULLIVAN, M.A., D.C.L., of Osgoode Hall, Barrister-at-Law. Scholar-in-Law in University of Toronto. Hon. D.C.L., Laval. Author of "Practical Conveyancing," "How to draw a Simple Will," "Essays on Treaties affecting Canada and the United States," etc. Second edition, enlarged and improved. Toronto: Carswell & Co., 1887.

The second edition of Mr. O'Sullivan's book is much larger than the first, and is more ambitious in tone. It is partly descriptive, partly historical, and partly jurisprudential. Within the latter qualification fall the most important functions of a writer on constitutional law. And with the constitution of Canada will probably be found the greatest difficulty. While recognizing the value of the book upon this division of the subject we do not hesitate to discuss with the learned writer some of the principles of our charter. With respect to the sovereign power the simplest and most truthful doctrine is that none exists in Canada, save such as exist inherently in the supreme power of the British Dominions. Though we have very full powers of legislation and government they are not derived from any inherent power. The executive and legislative machinery are derived from or created by the sovereign power of the British Dominions, the Imperial Parliament composed of Queen, Lords and Commons. It is true that it is shaped to agree with the will of the people, but this is politically speaking only. Constitutionally

speaking, we are in habitual obedience to the Imperial Parliament as long as we act constitutionally under the British North America Act. Every time the Parliament of Canada meets, it is an act of obedience to the Sovereign power; so every meeting of a legislature is a similar act of obedience. This determines the residence of sovereign power. Again, with respect to Dominion legislation, no Act of the Parliament of Canada is the act of a sovereign body, because the absolute power of veto remains with the Queen. And though Her Majesty appears to have abandoned all control of local legislation to the provincial legislatures by subjecting their legislation to the veto of the Governor-General, this abandonment is not real, for the Imperial Parliament may still exercise its functions by repealing any Provincial Act or otherwise directly legislating for any portion of the Dominion. The same consideration leads to the opinion that the union should not be denominated a federal union. The term signifies a union based upon treaty, and implies the power of revoking or annulling the agreement by the same bodies which created it. There was no treaty making power in the colonies. They agreed with the Imperial Parliament to surrender their old rights and accept new provisions for government as territorially forming a new dependency. The old provinces no longer exist. In their place stands an entirely new creation, a new dependency formed of the old territory. The foundation of all power is the statute, not the agreement. The terms "confederation" and "federal" are more convenient than correct. Though it may be quite true, as Mr. O'Sullivan asserts (p. 22) that the old provinces were the originators and controllers of the Act of Union, and assigned to themselves what they wanted, it is not true in any sense that that is the origin of the power to legislate. There is a primary grant to the Parliament of Canada of power to legislate for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the provinces. The excepted subjects are assigned *nomina-tim* to the provinces. No interpretation based upon the

Quebec resolutions would ever be accepted ; it must depend upon the Act. So that whatever might have been the intention of the people of the old provinces, if the Act does not express it, it cannot be carried out by interpretation. These matters, however, depend largely upon opinion, as the charter is a novelty, and the expression of contrary views does not by any means involve absurdities or incorrectness of judgment.

With respect to the book generally, more cannot be desired by an author than that it should be placed upon the curriculum at Osgoode Hall, and this having been achieved nothing that we can add can enhance its value.

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*A Treatise on the Law relating to the Custody of Infants.*  
By LEWIS HOCHHEIMER, of the Baltimore Bar. Baltimore :  
John Murphy & Co., 1887.

We have already standard works upon minors, but the arrangement of the many American cases into a text for the guidance of practitioners will be accepted gratefully. English cases being the foundation of the law are cited and commented on, but the bulk of the book contains American law. It is comprehensive, clear and concise, and very easy of reference.

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## REVIEW OF EXCHANGES.

*Central Law Journal.*—4th March, 1887.

**Certificates of Deposit**, by A. J. DOWNIE. A certificate of deposit issued by a bank is an evidence of debt in the nature of a receipt. It is negotiable if expressed in negotiable words, and may be informally expressed. American cases are cited.

*Ibid.*—11th March, 1887.

**Who are passengers**, by JOHN D. LAWSON. A stowaway, or a person stealing a passage on a train, is not a passenger; nor is one who travels free by the grace of a conductor. Where a passenger on a ferry boat who had paid the fare one way, remained on board and returned without paying for the return journey, it was held in New York that he might recover for injury received by the negligence of the carriers on the return journey. A person injured on a train on which he was travelling contrary to the rules of the company was held entitled to recover for negligence as he had paid a fare to the conductor with whose consent he was on the train. A person getting on a wrong train by mistake is a passenger. But a person travelling on a non-transferrable pass is not; nor one who is travelling on another's commutation ticket not transferrable. One who openly refuses to pay his fare is not a passenger. A vendor of the abominations sold on trains is a passenger if he travels on a season ticket; so is a barkeeper on a boat if he pays rent but no passage money. Mail and express messengers are passengers, and so is a person in charge of a private car. A boy boarding a train to sell newspapers is not a passenger. A person entering a station or car to see another off, or to meet a coming passenger, is there by right, and the carrier is responsible for a negligent injury to him.

*Ibid.*—18th March, 1887

**The dissolution of a trading Corporation by the sale of its assets—Majority rule**, by HENRY N. MORRIS. It is a general rule that the majority of shareholders may, without the consent of the minority, sell the entire assets of the corporation, close out the business, distribute the proceeds of the sale, and surrender the charter. The sale must be made with the *bona fide* purpose of winding up the company; the minority are entitled to an immediate distribution of the proceeds, which cannot be used for any purpose not authorized by the original contract of association. The minority cannot be compelled to take an annuity instead of their just proportion of the assets.

# THE CANADIAN LAW TIMES.

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DECEMBER, 1887.

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## QUEBEC RESOLUTIONS OF 1887.

**T**HE following is the full text of the resolutions adopted by the Inter-Provincial Conference which recently sat at Quebec :—

Whereas, in framing the British North America Act 1867, and defining therein the limits of the Legislative and Executive powers and functions of the Federal and Provincial Legislatures and Governments, the authors of the Constitution performed a work, new, complex and difficult, and it was to be anticipated that experience in the working of the new system would suggest many needed changes ; that twenty years' practical working of the Act has developed much friction between the Federal and Provincial Governments and Legislatures, has disclosed grave omissions in the provisions of the Act, and has shown (when the language of the Act came to be judicially interpreted) that in many respects what was the common understanding and intention had not been expressed, and that important provisions in the Act are obscure as to their true intent and meaning ; and whereas the preservation of Provincial autonomy is essential to the future well-being of Canada, and if such autonomy is to be maintained, it has become apparent that the constitutional Act must be revised and amended ; therefore, the representatives and Delegates of the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick and Manitoba, duly accredited by their respective

Governments and in conference assembled, believing that they express the views and wishes of the people of Canada, agree upon the following resolutions as the basis upon which the Act should be amended ; subject to the approval of the several Provincial Legislatures.

1. That by the British North America Act exclusive authority is expressly given to the Provincial Legislatures in relation to subjects enumerated in the 92nd section of the Act ; that a previous section of the Act reserves to the Federal Government the legal power of disallowing at will all Acts passed by a Provincial Legislature ; that this power of disallowance may be exercised so as to give to the Federal Government arbitrary control over legislation of the provinces within their own sphere ; and that the Act should be amended by taking away this power of disallowing provincial statutes, leaving to the people of each Province, through their representatives in the Provincial Legislature, the free exercise of their exclusive right of legislation on the subjects assigned to them, subject only to disallowance by Her Majesty in Council as before Confederation ; the power of disallowance to be exercised in regard to the provinces upon the same principles as the same is exercised in the case of Federal Acts.

2. That it is important to the just operation of our Federal system, as well that the Federal Parliament should not assume to exercise powers belonging exclusively to the Provincial Legislatures as that a Provincial Legislature should not assume to exercise powers belonging exclusively to the Federal Parliament ; that to prevent any such assumption, there should be equal facilities to the Federal and Provincial Governments for promptly obtaining a judicial determination respecting the validity of statutes of both the Federal Parliament and Provincial Legislatures ; that constitutional provision should be made for obtaining such determination before, as well as after, a statute has been acted upon ; and that any decision should be subject to appeal as in other cases, in order that the adjudication may be final.

3. That it is in the public interest, with a view to avoiding uncertainty, litigation and expense, that the constitutionality of Federal or Provincial Statutes should not be open to question by private litigants, except within a limited time (say two years) from the passing thereof; that thereafter such constitutionality should only be questioned at the instance of a government, Federal or Provincial; that any enactment decided, after the lapse of the limited time, to be unconstitutional should, for all purposes other than the mere pronouncing of the decision, be treated as if originally enacted by the Legislature or Parliament which had jurisdiction to enact the same, and as being subject to repeal or amendment by such legislature or parliament.

4. That a leading purpose of the Senate was to protect the interests of the respective provinces as such; that a Senate to which the appointments are made by the Federal Government, and for life, affords no adequate security to the provinces; and that, in case no other early remedy is provided, the British North America Act should be so amended as to limit the term for which Senators hold office, and to give the choice, as vacancies occur, to the province to which the vacancy belongs, until, as to any province, one half of the members of the Senate representing such province are Senators chosen by the province; that thereafter the mode of selection be as follows: if the vacancy is occasioned by the death, resignation or otherwise of a Senator chosen by a province, that province to choose his successor; and if the vacancy is occasioned by the death, resignation or otherwise of any other Senator, the vacancy to be filled as now provided by the Act, but only for a limited term of years.

5. That it was the intention of the British North America Act, and of the provinces which were thereby confederated, that in respect of all matters as to which the provincial legislatures have authority, the Lieutenant-Governor of every Province, as the representative of the Sovereign in provincial affairs, should have the same executive author-



ity as other Governors and Lieutenant-Governors of British colonies and provinces; that the Act has practically been so construed and acted upon in all the Provinces ever since Confederation; that it is of essential importance to the Provinces that this right should be maintained, and should be placed beyond doubt or question; that, there being no express provision in the Act declaring such right, and the right being in consequence occasionally denied and resisted, the Act should be amended by declaring its true construction to be according to the intention and practice as herein mentioned.

6. That the Federal authorities construe the British North America Act as giving to the Federal Parliament the power of withdrawing from provincial jurisdiction local works situated within any Province, and though built in part or otherwise with the money of the Province or the municipalities thereof; and of so withdrawing such local works (without compensation) by merely declaring the same to be for the general advantage of Canada or for the advantage of two or more Provinces, whether that is or is not the true character of such works within the meaning and intention of the Act; that it was not the intention that local works should be so withdrawn without the concurrence of the Provincial Legislature, or that the power of the Federal Parliament should apply to any other except "such works as shall, although lying wholly within any Province, be specially declared by the Acts authorizing them, to be for the general advantage," as expressly mentioned in section 29, sub-section 11, of the resolutions of the Quebec Conference of 1864, and that the Act should be amended accordingly.

7. That there exists in each Province the requisite machinery for preparing voters' lists and revising the same for elections to the Provincial Assembly; that, without any detriment to either Federal or Provincial interests, the lists so prepared were used for twenty years at all Federal elections, under the express terms of the British North America Act and of subsequent statutes of the Federal

**Parliament ; that the preparation of separate voters' lists for Federal elections is cumbrous and confusing, and involves great loss of time and needless expense to all concerned therein ; and that in the opinion of this conference the British North America Act should be so amended as to provide that, at all elections to the Federal Parliament, in any Province, the qualification and lists of electors should be the same as for the Legislative Assembly of the province.**

8. That the intention of the British North America Act and of the several provinces thereby confederated was, that the provincial authorities should have the power of appointing stipendiary, police and other magistrates, and all officers who are under the jurisdiction of the Provincial Legislatures ; that ever since Confederation all such appointments have accordingly been made by provincial authority ; that it is just and right in the general interest that the Provinces should have this power ; that a question has been raised in some of the provincial Courts as to whether, by the technical effect of the Act, such power exists ; and that to remove all doubt on so important a matter, an amendment of the Act should be obtained, expressly declaring that the jurisdiction to make such appointments does belong to the Provinces.

9. That according to the intention of the British North America Act and its promoters, the Provinces are entitled to all fees paid or payable on legal proceedings in the Provincial Courts ; that the Provinces accordingly have always enjoyed or dealt with the revenue therefrom ; that according to a recent decision of her Majesty's Privy Council the Provincial Legislatures cannot legislate as to such fees or apply the revenue to provincial purposes ; and that the Act should be so amended as to expressly give this constitutional right.

10. That by the British North America Act the Provincial Legislatures have exclusive jurisdiction to make laws in relation to the administration of justice, including the constitution, maintenance and organization of provincial

courts, both of civil and criminal jurisdiction ; that a judicial opinion has been expressed that a Lieutenant-Governor has the power of issuing commissions to hold Courts of Assize and *Nisi Prius*, Oyer and Terminer, and general gaol delivery, but the right to do so is considered to be so open to question that, when it is deemed necessary to hold such a court, independent commissions expressed in the same terms have, by arrangement between the Federal and Provincial Governments, been issued by the Governor-General and the Lieutenant-Governor ; that it is expedient that all doubt should be removed, and the contrivance of two commissions rendered unnecessary ; and that an amendment of the Act should expressly declare that the Lieutenant-Governors have power to issue such commissions, subject to provincial statutes.

11. That it has been found by the experience of all legislative bodies to be necessary that they should possess certain privileges and immunities to enable them effectually to discharge the functions entrusted to them ; that, for this purpose, Acts have been passed by the Parliament of Canada, and confirmed by Imperial legislation, defining the privileges, immunities and powers of the two Houses and of the members thereof ; that Acts in like manner have been passed by several Provincial Legislatures, defining the privileges of their Legislative Councils and Legislative Assemblies ; that these Acts have not yet been confirmed by Imperial legislation ; that doubts have been expressed as to the power of the Provincial Legislatures to pass these laws ; that a Provincial Legislature should have the same power to pass Acts defining the privileges of the Legislative Council and Legislative Assembly and of the members thereof as the Federal Parliament has to pass Acts defining the privileges of the Senate and House of Commons and of the members thereof ; that the Provincial Acts should be confirmed as the Federal Acts were ; and that it should be declared by the amending Imperial statute that a Provincial Legislature has, with respect to itself, the same powers as the Federal Parliament has with reference to such Parliament.

12. That in two of the Provinces of the Dominion there is no second chamber ; that in five of the Provinces there is a second chamber ; that in one of these five the Legislative Council is elective and for a limited term ; that in the other four the appointments are by the Lieutenant-Governor and for life ; that the experience which has been had since Confederation shows that, under responsible government and with the safeguards provided by the British North America Act, a second provincial chamber is unnecessary, and the expense thereof may in all the provinces be saved with advantage ; that under the Act a Provincial Legislature has power to amend the constitution of the Province ; that this power includes the abolition of the Legislative Council, or changing the method of constituting the same ; that the provision has failed to effect the abolition of the council in some provinces where public opinion is believed to favour such change ; and that the Act should be so amended as to provide that, upon an address of the House of Assembly, the elected representatives of the people, her Majesty the Queen may by proclamation abolish the Legislative Council, or change the constitution thereof, provided that the address is concurred in by at least two-thirds of the members of such House of Assembly.

13. That by the British North America Act it is provided that all lands belonging to the several Provinces of Canada shall belong to the Provinces respectively in which they are situate ; that the claim recently made by the Federal Government to all Crown lands as to which there was no treaty with the Indians before Confederation, is contrary to the intention of the Act and of the Provinces confederated, is unjust, and is opposed to the construction which, until a recent period, the Act received from the Federal authorities, as well as from the Legislatures and Governments of the Provinces ; and that the Act should be amended so as to make clear and indisputable in its technical effect, as well as its actual intention, that all such lands belong to the province in which they are situate, and not to the Dominion.

14. That by the British North America Act the jurisdiction with respect to bankruptcy and insolvency is assigned to the Federal Parliament; that there is no Federal law on that subject now in force; that, in the absence of a law for the whole Dominion, it is in the public interest that each Province should be at liberty to deal with the matter, subject to any Federal law which may thereafter be passed; that it is doubtful how far, under the present provisions of the Act, the Provincial Legislatures can deal with the subject; and it is desirable that the Act be amended by expressly giving to the Provinces the necessary jurisdiction, in the absence of and subject to any Federal law.

15. That it was provided by the 44th resolution of the Quebec Conference of 1864 that "the power of respiting, reprieving and pardoning prisoners convicted of crimes, and of commuting and remitting of sentences in whole or in part, which belongs of right to the Crown, should be administered by the Lieutenant-Governor of each Province in Council," subject, as in the said resolution set forth; that all provision relating to this power was omitted from the British North America Act; that by the Royal instructions given to the Governor-General subsequently to the passing of the Act, his Excellency is (among other things) "authorized and empowered to grant any offender convicted of any crime in any court or before any judge, justice or magistrate within the Dominion a pardon;" that by reason of this language and otherwise doubts have arisen as to the power of a Lieutenant-Governor of a Province to respite, reprieve or pardon prisoners convicted of an offence against the laws of the Province, or of commuting and remitting, in whole or in part, any sentence, fine, forfeiture, penalty or punishment in respect of any such offence; that it is presumed this was not the purpose of the instructions; that the power of dealing with all matters relating to the execution of provincial laws shall belong to the Lieutenant-Governor in Council of each Province, leaving (if deemed desirable) the power of the Federal Government to apply to

other cases ; and that the Act should be amended accordingly.

16. That the Provinces represented at this conference recognize the propriety of all questions as to the boundaries of the Provinces being settled and placed beyond dispute ; that the boundaries between Ontario, Manitoba and the Dominion, so far as the same have been determined by her Majesty in Privy Council, should be established by Imperial statute, as recommended by the order of her Majesty ; and that the whole northern boundaries of Ontario and Quebec should be determined and established without further delay.

17. That by the British North America Act all the customs and excise duties, as well as certain other revenues of the Provinces, were transferred from the Provinces to the Dominion, and it was provided (1) that the following sums should be paid yearly by the Dominion to the several Provinces for the support of their Governments and Legislatures :

Ontario.....	\$80,000
Quebec .....	70,000
Nova Scotia.....	60,000
New Brunswick.....	50,000

And that an annual grant in aid of each Province should be made, equal to 80 cents per head of the population as ascertained by the census of 1861, with a special provision in the case of Nova Scotia and New Brunswick ;

(2) That the revenue of the Dominion, at the inception of Confederation, was \$13,716,786, of which 20 per cent., or \$2,753,906, went to the Provinces for provincial purposes ; 80 per cent., or \$10,962,880, going to the Dominion ; that by increased taxation, on an increased population, the Dominion revenue has been raised from \$13,716,786 to \$33,177,000 ; that, while this increased taxation is paid by the people of the provinces, and the increase of population imposes upon the Provinces largely increased burdens, no corresponding increase of subsidy has been granted to them, 13 only, instead of 20 per cent.,

of the increased revenue of the Dominion, or \$4,182,525, being now allowed to the Provinces, while, instead of 80 per cent., 87 per cent., or \$28,994,475, is retained by the Dominion ;

(3) That the yearly payments heretofore made by the Dominion to the several provinces under the British North America Act have proved totally inadequate for the purposes thereby intended ; that the actual expenses of civil government and legislation in the several Provinces greatly exceed the amount provided therefor by the Act ; and that the other expenditure necessary for those local purposes which, before Confederation, were provided for out of provincial funds, has largely increased since ;

(4) That several of the Provinces are not in a condition to provide, by direct taxation or otherwise, for the additional expenditure needed, and in consequence have from time to time applied to the Federal Parliament and Government for increased annual allowances ;

(5) That this Conference is of opinion that a basis for a final and unalterable settlement of the amounts to be yearly paid by the Dominion to the several Provinces for their local purposes and the support of their Governments and Legislatures, may be found in the proposal following, that is to say :

(a) Instead of the amounts now paid, the sums hereafter payable yearly by Canada to the several Provinces for the support of their Governments and Legislatures, to be according to population and as follows :

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|--|-----------|
| (a) Where the population is under 150,000.....                         | \$100,000 |
| (b) Where the population is 150,000 but does not exceed 200,000.....   | 150,000   |
| (c) Where the population is 200,000 but does not exceed 400,000.....   | 180,000   |
| (d) Where the population is 400,000 but does not exceed 800,000.....   | 190,000   |
| (e) Where the population is 800,000 but does not exceed 1,500,000..... | 220,000   |
| (f) Where the population exceeds 1,500,000.....                        | 240,000   |



(b) Instead of an annual grant per head of population now allowed, the annual payment hereafter to be at the same rate of eighty cents per head, but on the population of each Province, as ascertained from time to time by the last decennial census, until such population exceeds 2,500,000 ; and at the rate of sixty cents per head for so much of said population as may exceed 2,500,000 ;

(c) The population, as ascertained by the last decennial census, to govern except as to British Columbia and Manitoba ; and as to these two Provinces, the population to be taken to be that upon which, under the respective statutes in that behalf, the annual payments now made to them respectively by the Dominion are fixed, until the actual population is by the census ascertained to be greater ; and thereafter the actual population, so ascertained, to govern ;

(d) The amounts so to be paid and granted yearly by the Dominion to the Provinces respectively to be declared by Imperial enactment to be final and absolute, and not within the power of the Federal Parliament to alter, add to or vary ;

(6) That the following table shows the amounts which, instead of those now payable for government and legislation and *per capita* allowances, would hereafter be annually payable by the Dominion to the several Provinces (the same being calculated according to the last decennial census for the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, and Prince Edward Island, and according to the limit of population now fixed by statute for the Provinces of British Columbia and Manitoba :

<i>Province.</i>	<i>Popula- tion Census 1881.</i>	<i>Allowance for Government and Legislation.</i>	<i>The Subsidy per Head.</i>	<i>Total Allow- ance for Government, etc., and Subsidy.</i>
Ontario .....	1,923,328	\$240,000	\$1,538,662 40	\$1,778,662 40
Quebec .....	1,359,027	220,000	1,087 221 60	1,307,221 60
Nova Scotia .....	440,572	190,000	352,457 60	542,457 60
New Brunswick .....	321,233	180,000	256,986 40	436,986 40
Prince Edward Island.	108,891	100,000	87,112 80	187,112 80
Manitoba .....	150,000	150,000	120,000 00	270,000 00
British Columbia .....	60,000	100,000	48,000 00	148,000 00
		\$1,180,000	\$3,490,440 80	\$4,670,440 80



(7) That this Conference deems it desirable that the proposal above set forth should be considered by the Governments of the several Provinces of the Dominion ; and, if approved of, should be submitted to the Provincial Legislatures.

18. That, in the opinion of this Conference, the several Provinces of the Dominion, through their respective Legislatures, should at the earliest practicable moment take steps with the view of securing the enactment by the Imperial Parliament of amendments to the British North America Act in accordance with the foregoing resolutions.

There having been submitted for the consideration of this Conference some matters of inter-provincial interest and concern in respect whereof no amendment of the British North America Act is necessary, this Conference, as to certain of the said matters, resolves as follows :—

19. That in view of the doubts which arise from time to time as to the respective powers of the Federal Parliament and Provincial Legislatures, it is expedient and just that it should be enacted by the respective Provincial Legislatures, that no action shall lie against any judge, stipendiary or police magistrate, justice of the peace, or officer, for any act done under the supposed authority of a statutory provision which may afterwards be held to have been beyond the legislative jurisdiction of Parliament or the Legislature which enacted the same, provided the action would not lie against him if the statutory provision had been within such legislative jurisdiction.

20. That it is desirable that the laws of the several Provinces for the enforcement of debts should be assimilated as far as may be consistent with the different legal systems prevailing in the respective Provinces ; that this conference is of opinion that such assimilation should include provisions against preferences by insolvent debtors, and provisions for the examination of debtors, and for taking speedy possession of an insolvent's estate for the benefit of his creditors ; so far as these subjects can be dealt with by the Provincial Legislatures.

21. That this Conference approves of there being legislative provision in the several Provinces of the Dominion for rendering effectual in all the Provinces (subject to proper conditions) probates and letters of administration granted in any one of them.

22. That this Conference approves of a similar law being passed in all the provinces (subject to proper conditions) with respect to probates and letters of administration granted in the United Kingdom, to go into effect when probates and letters of administration granted in the Dominion are by Imperial legislation made effectual in the United Kingdom.

The following additional resolutions were adopted :—

1. That having reference to the agitation on the subject of the trade relations between the Dominion and the United States, this inter-provincial conference, consisting of representatives of all political parties, desires to record its opinion that unrestricted reciprocity would be of advantage to all the Provinces of the Dominion; that this conference, and the people it represents, cherish fervent loyalty to her Majesty the Queen and warm attachment to British connection; and that this Conference is of opinion that a fair measure providing under proper conditions for unrestricted reciprocal trade relations between the Dominion and the United States would not lessen these sentiments on the part of our people, but on the contrary may even serve to increase them, and would, at the same time, in connection with an adjustment of the fishery dispute, tend to happily settle grave difficulties which have from time to time arisen between the Mother Country and the United States.

2. That the Legislature of the Province of Manitoba at its last session enacted a measure providing for the construction of a railway from the City of Winnipeg to West Lynne, known as the Red River Valley Railway; that the line of the proposed railway is within the original limits of the Province of Manitoba as defined by 33 Vict. cap. 3, of the Statutes of Canada; that by the subsequent Act, 44 Vict. cap. 14, for the extension of the boundaries of the

Province, it was enacted, "that the said increased limit and the territory thereby added to the Province of Manitoba shall be subject to all such provisions as may have been or shall hereafter be enacted respecting the Canadian Pacific Railway and the lands to be granted in aid thereof; that this provision does not apply to the original limits of the Province; that the Province of Manitoba in accepting the extension of its boundaries on the conditions mentioned did not surrender any right, power or franchise which may be exercised by the Province within its original limits; that the Legislature in passing its measure for the construction of the Red River Valley Railway acted within its constitutional powers; that the Act has notwithstanding been disallowed by the Federal Government; that this Conference views with alarm this encroachment of the Federal upon Provincial power by which the will of the people of a Province in a matter within provincial jurisdiction is subordinated to the will of the central power; and that this Conference desires to express its sympathy with the people and Legislature of Manitoba in their struggle for the rights of their Province.

[The delegates from the Province of New Brunswick did not concur in this motion, and wished their dissent to be placed on record.]

*Resolved*, That copies of the foregoing resolutions be formally communicated by the president on behalf of this Conference to the Federal Government, and that the Conference do cordially invite the co-operation of the Federal Government in carrying into effect the resolutions.

That copies of the foregoing resolutions be also transmitted by the president of this Conference to the respective Governments of the Provinces not represented at this Conference, namely, Prince Edward Island and British Columbia, with a view to their concurrence in and support of the conclusions arrived at by this Conference.

(Signed),

O. MOWAT, Prime Minister of Ontario and Attorney-General.

**HONORE MERCIER**, Prime Minister of Quebec and Attorney-General.

**W. S. FIELDING**, Prime Minister of Nova Scotia and Provincial Secretary.

**ANDREW G. BLAIR**, Prime Minister of New Brunswick and Attorney-General.

**J. NORQUAY**, Prime Minister of Manitoba, President of Council and Provincial Secretary.

**C. F. FRASER**, Executive Councillor of Ontario and Commissioner of Public Works.

**ARTHUR S. HARDY**, Executive Councillor of Ontario and Provincial Secretary.

**A. M. ROSS**, Executive Councillor, and Treasurer of Ontario.

**GEO. W. ROSS**, Executive Councillor and Minister of Education.

**DAVID A. ROSS**, Executive Councillor of Quebec.

**ARTHUR TURCOTTE**, Executive Councillor of Quebec and acting Commissioner of Crown Lands.

**JOSEPH SHEHYN**, Executive Councillor of Quebec and Provincial Treasurer.

**CHAS. A. ERN. GAGNON**, Executive Councillor of Quebec, Provincial Secretary and Registrar.

**J. McSHANE**, Executive Councillor of Quebec and Commissioner of Agriculture and Public Works.

**GEO. DUHAMEL**, Executive Councillor of Quebec and Solicitor General.

**F. G. MARCHAND**, Speaker of Legislative Assembly of Quebec.

**J. W. LONGLEY**, Executive Councillor of Nova Scotia and Attorney-General.

**A. MacGILLIVRAY**, Executive Councillor of Nova Scotia.

**DAVID McLELLAN**, Executive Councillor, Provincial Secretary and Receiver-General of New Brunswick.

**C. E. HAMILTON**, Executive Councillor of Manitoba and Attorney-General.

## EDITORIAL REVIEW.

**Sir Adam Wilson's Farewell.**

On the opening of the November Sittings of the Divisional Court, Sir Adam Wilson took farewell leave of the Bar. He had previously declined the tender of a public dinner by the Law Society, preferring to hear and say a few farewell words on the occasion of his retirement.

At twelve o'clock Sir Adam took his seat in the Chief Justice's chair with Chief Justice Armour on his right. There were present, the Chief Justice of Ontario, the Chancellor, the Chief Justice of the Common Pleas, Justices Burton, Patterson, Osler, Ferguson, Rose and Robertson.

The following Queen's Counsel were present:—Messrs. C. Moss, B. M. Britton, W. A. Reeve, A. Bruce, Z. A. Lash, C. F. Fraser, J. Hoskin, Æ. Irving, J. Maclellan, B. B. Osler, G. D. Dickson, W. A. Foster, W. Lount, C. H. Ritchie, J. Tilt, J. K. Kerr, W. Laidlaw, J. H. Macdonald, J. Bain and J. H. Morris. The Junior Bar was also very largely represented.

In the absence of the Attorney-General, Mr. Æmilus Irving, Q.C., on behalf of the Bar, then said:—

The members of the Bar now present understand this is an occasion upon which an opportunity is to be afforded to us to wish you farewell upon your retirement from the position of Chief Justice of the Queen's Bench. The large number of gentlemen assembled here to testify most distinctly to the interest that is taken in the occasion, and I may also add of the affection which is borne by the Bar generally towards yourself. If I may be permitted to speak of a matter personal to yourself while so many men are here present, the first thing that would occur to me would be to

say (your career connected with the profession having ranged over 50 years, one-half of which has been upon the Bench) that it was a matter of reflection that at the time your Lordship joined the profession few of the many who are now present here were born, and that there are instances of those now here upon the Bench who at that time were not born, so that the country sees how long and how valuable your services have been—services to those clients who enjoyed your confidence and had the advantage of your ability, industry and attention for five and twenty years, and services to the country which have hardly ever been equalled in length of time, and have certainly never been at all excelled by anyone in his devotion to his business. It is always a painful matter to say farewell, but it is not an absolute farewell. We look forward with great pleasure to the fact of your long being a member of the Law Society, and that we shall long have the pleasure of seeing you; and that you may enjoy health, I assure you, is the wish and hope and expectation of everyone now here present.

Sir Adam Wilson replied as follows:—Mr. Irving and Gentlemen of the Bar,—I thank you most sincerely for the very kind words you have addressed to me upon the occasion of my retirement from the Bench. I have been for a considerable length of time a judge upon the Bench of Ontario, and during that time I have always had the hearty co-operation of the Bar and their valuable assistance. I have seen many changes in the law in the course of that period, and I think every change has been for the better, until at last we have a system which is as beneficial as it possibly can be to the suitor. I do not mean to say it is absolutely perfect, because there are some few matters that still require amendment; and among them, if I may be permitted to say it, is the question of trial by jury. I think, sir, in speaking both for yourself and the Bar, you have given vent to your kindly feelings and to the generosity of the Bar in conferring upon me praise which I do not by any means pretend to be entitled to. All I can say is, while I have been in the discharge of my judicial duties I have performed them according to the best of my ability,

and I think I may venture to say this much, that I have fairly and conscientiously applied myself to the duties which belonged to my position. There is nothing else to which I have given attention of any kind except my judicial functions during that period. No one can be perfect either as judge or in any other capacity, and more particularly I might say as a judge, because his judgment properly considered is nothing more than an individual opinion. But his opinion may differ from the opinion of another judge, just as the opinion of one man may differ from the opinion of another, and so with regard to myself; and yet there may be no want of ability on the part of either one or the other. It may happen that both may be right, and to some extent it may happen that one only is right, and it may happen both are wrong. I intended, gentlemen of the Bar, to resign my office a twelve month ago. I did not, however, put it into anything like a formal shape until within the last few months, and it is extraordinary that during that short period there have been two judges of the Bench who have gone before me, and a third judge, who is a member of this society, who is almost, we might consider, a judge of our own. I refer to the Chief Justice of Manitoba. He also has gone before me, although it is just a few weeks since I saw him in robust health, as he expressed himself to me. I hope, sir, although I do retire from the Bench, that I still shall have the association of the old members of the Bar, the younger members of the Bar whom I have not seen so much, and even I hope of the younger gentlemen who are preparing themselves for a career at the Bar. I desire to part with all with the most perfect good feeling, and to maintain these feelings of friendship established so long between the members of the Bar and myself. If I may be permitted also to say before closing, that I find the gentlemen of the Bar do not feel themselves confined to mere provincial practice, that they are now taking a very active part in the decisions in a higher tribunal, namely, the Privy Council, and I hope that that tribunal for which we have a profound respect, may as our ultimate Court of Appeal long subsist, and in that way

there will be one tie between this Dominion and our beloved Mother Country which I hope never to see severed. I have only to say that I remain still a member of the Bar. I see many gentlemen here who I know will sustain the character and honour of the Bar to the last, and a growing generation to succeed them. I shall remain a member of that bar to the very last.

### **Changes in the Judiciary.**

At no time, at no recent period at least, have such numerous changes taken place on the Bench within such a short period as in the present year.

Several Judges have been appointed in Quebec, one in Manitoba, and three in Ontario, while Mr. Burbridge, Q.C., has been appointed to a seat in the Exchequer Court.

The vacancy in the Common Pleas Division in Ontario occasioned by the death of Sir Matthew Cameron was followed by a vacancy in the Queen's Bench Division occasioned by the rather sudden death on circuit of Mr. Justice O'Connor, and the retirement of Sir Adam Wilson from the Chief Justiceship of the Queen's Bench made the third vacancy.

By the retirement of Sir Adam the Chancellor becomes President of the High Court. The Senior Justices of the Common Law Divisions have been appointed Chief Justices, each in his own Division; Mr. Falconbridge, Q.C., and Mr. Street, Q.C., have been appointed the puisne Justices of the Queen's Bench Division, and Mr. MacMahon, Q.C., a Justice of the Common Pleas Division.

The remarks made on behalf of the Bar upon the retirement of Sir Adam Wilson, and his reply, appear at another page; and on the occasion of his performing the first public function of his office as President of the High Court, the Chancellor made some remarks to his esteemed predecessor; but we cannot allow the occasion to pass without adding a word of praise on behalf of that excellent judge. He retires full of honour, with the esteem and respect of the whole Bar, having closed a most useful and honourable



career as a counsel and a judge. The distinction of knight-hood which was lately conferred upon him was never more honourably bestowed. His characteristics while on the Bench were, in addition to great experience and abilities, extreme conscientiousness and perseverance in the performance of his duties.

Of Mr. Justice O'Connor it may be said that the manner in which he performed his duties was a surprise to many. For many years he had been so deeply engaged in public life, that he may be said to have had no practice at the Bar. The changes in the constitution and practice of the Courts in recent years have been great; and it was at first thought that a want of familiarity with modern ideas would be a hindrance to the performance of his judicial functions. He, however, displayed a great aptitude for work, and his knowledge of men and their motives, his public experience, and a shrewd common sense, enabled him to dispose of the rights of litigants with satisfaction to the public.

#### **Fixing and Postponing Cases.**

From a note of a case of *Bird v. Andrew* in the *Weekly Notes* for 29th November last, it appears that the Court of Appeal in England is very jealous of any action which may interfere with the disposition of cases on their list for argument in the natural order.

The application was made with the consent of all parties to postpone the argument of an appeal until a fixed date upon the ground that certain witnesses whose examination would probably be directed to be taken before the Court would have to come from Wales, and that the solicitor of one of the parties was abroad.

Cotton, L.J., said, "It is a mistake to suppose that an application for the postponement of the hearing of an appeal made with the consent of all parties, will be granted as a matter of course. The parties cannot be allowed to settle the Court paper for themselves. Appeals must come

**on in due course, unless a sufficient reason is given for postponing them. If parties desire that their cases should not come on in their regular turn, they must apply to the Court, and shew the Court sufficient cause for granting the application. No sufficient cause has been shown in the present case, and the application must be refused."**

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REVIEW OF EXCHANGES.

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*American Law Review.*—May—June, 1887.

**The Canadian Fisheries Question**, by A. H. MARSH. The Treaties of 1783 and 1818, as affecting this question are set out. Then followed the Reciprocity Treaty of 1854, which is referred to; then the Treaty of Washington, the important part of which is set out. The learned writer then details the different claims made by the Americans and disposes of them by argument and citation of authorities. It has been argued that the Convention of 1818 became merged in the Reciprocity Treaty, and that because the latter was abrogated the former came to an end with it. The learned writer disposes of this by the argument that if this is the true way of construing these conventions, then the Treaty of 1783 became merged in that of 1818 and all are gone, and the two nations are relegated to their original rights—a climax not looked for by those who advocate the principle of merger. Attention is directed to the wording of the Convention of 1818, by which the right to fish is renounced: "And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbours of his Britannic Majesty's dominions in America, etc." Then follows the proviso to enter for certain specified purposes, but for no other purpose whatever. A number of authorities are cited, and the article contains a fund of valuable information on the subject.

**A Theory of Sovereignty Under the Federal Constitution**, by ROBERT LUDLOW FOWLER. The learned writer regards the Federal Government and the local governments of the States as mere manifestations of the sovereignty of the people. He cites authority to show that the English Parliament never had any authority in the Colonies, and he argues that prior to the revolution the Sovereignty was partly in the King and the electors of the Colony as one Sovereign body, and partly in the King alone. The result of the revolution was to transmit the prerogatives of the Crown to the colonists at large, who allow their Governments to exercise a portion of them.

**Doctrins of Notice of Dissolution of Partnership restated**, by CLEMENT BATES. The object of the article is said to be to expose the inaccuracy of the loose expressions of text books and decisions that actual notice of dissolution must be given to former dealers, and old

customers, and notice by publication to non-dealers, to exonerate the partners from subsequent contracts by one of their number in the firm name.

**The Canadian Fisheries Dispute—An Open Letter to Senator Morgan**, by CHARLES L. WOODBURY. What there is of argument in this article tends towards showing that the right to land and buy bait for fishing is an ordinary right of commerce and therefore should not be denied to American fisherman.

*Central Law Journal*.—25th March, 1887.

**Extra Territorial Criminal Jurisdiction**, by D. H. PINGREY. After reviewing cases and diplomatic correspondence, the learned writer concludes as follows:—"The conclusion of the whole matter is, and so held by civilized nationalities, that criminals are infraterritorially liable for offences extraterritorially set in motion to disturb the peace of the State, and when these violators of the law come within the State offended, they may be held responsible and amenable to the laws."

*Ibid.*—1st April, 1887.

**Examination of title—constructive notice**, by WM. M. ROCKEL. American cases are cited.

*Ibid.*—8th April, 1887.

**Sub-lessees and covenants in leases**, by JAMES P. OLIVER. English and American cases are cited.

*Ibid.*—15th April, 1887.

**Chattel Mortgage descriptions**, by W. F. ELLIOTT. It is a rule that a description in a chattel mortgage is sufficient if it will enable a third person, aided by enquiries which the instrument suggests, to identify the property. Examples are given of sufficient and insufficient descriptions.

*Ibid.*—29th April, 1887.

**Stoppage in transitu—What constitutes delivery to the Vendee**, by H. CAMPBELL BLACK. A number of cases are cited, showing what constitutes taking possession by the purchaser. When a vendor levies an attachment it is doubtful as to its effect; but when a third party attaches them for insolvency of the purchaser the right of stoppage remains.

*Ibid.*—6th May, 1887.

**Insufficiency of Sewerage and Drainage**, by ALBERT N. KRUPP. A city is responsible for negligently suffering their sewers to occasion a nuisance to the estates of adjoining owners, if it does not result from the original plans of construction and could be avoided by keeping them in proper condition.

*Ibid.*—13th May, 1887.

**Fictitious and partly paid up stock, and the rights and liabilities of holders thereof**, by STERLING A. WOOD. American cases are cited.

*Ibid.*—20th May, 1887.

**The doctrine of res gestae**, by WM. M. ROCKEL. Cases are cited showing that in various cases declarations have been allowed to be received in evidence after an accident as to how it occurred, provided they were in some degree connected therewith, the true test being that the matter was continuing at the time.

*Ibid.*—27th May, 1887.

**Some points concerning Elections**, by J. R. BERRYMAN. A number of American cases are cited.

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Entered according to Act of the Parliament of Canada, in the year one thousand eight hundred and eighty-eight, by CARSWELL & Co., in the office of the Minister of Agriculture.

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PRINTED BY  
MOORE & Co., LAW PRINTERS,  
20 ADELAIDE ST EAST,  
TORONTO.



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# THE CANADIAN LAW TIMES.

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## OCCASIONAL NOTES.

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Supreme Court of Canada.

QUEBEC.]

GREGOIRE v. GREGOIRE.

*Tutor and Minor—Sale prior to 1st Aug., 1886—Action to annul—Prescription—Arts. 2243, 2258, C.C.*

*Held*, affirming the judgment of the Court below, Fournier and Henry, JJ., dissenting, under Arts. 2243—2258, C.C., that an action to annul a sale made in 1855 by a minor, emancipated by marriage, to her father and executor (without any account being rendered, but after the making of an inventory of the community existing between her father and mother) of her share in her mother's succession, was prescribed by ten years from the date when the minor became of age. *N. K. Motz v. Moreau*, 7 L. C. R. 147, affirmed and followed.

*Geoffrion*, for the appellant.

*Paradis*, for the respondent,

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McMILLAN v. HEDGE.

*Servitude, aggravation of—Art. 558, C.C.*

On the 26th March, 1853, one G. L. by deed of sale granted to P. C. "a right of passage through a lot of land fronting the public road as well on foot as with carriage and at the charge to the said purchaser of keeping the gates of the said passage shut."



In 1852, McM., having acquired the dominant land, built a coal oil refinery and warehouses thereon. In the course of his trade he had several heavy carts making three or four trips a day through this passage, leaving the gate open, and in addition to his own carts, most of the coal oil dealers of the city of Montreal, wholesale and retail, were approvisioned there with their own carts. At the time of the grant the land was used as agricultural land. The passage was ten feet in width.

*Held*, affirming the judgment of the Court below, Henry, J., dissenting, that the passage could not be used for the purposes of a coal oil refinery and trade, as McM. thereby aggravated the servitude and rendered it more onerous to the servient land than it was when the servitude was established.

*Davidson, Q.C.*, for the appellant.

*Pagnuelo, Q.C.*, for the respondent.

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NOVA SCOTIA.]

## CONFEDERATION LIFE ASSOCIATION OF CANADA v. O'DONNELL.

*Life insurance—Delivery of policy—Escrow—Instructions to agent—Policy not countersigned—Payment of premium—Admissibility of evidence—Entry in books of deceased against interest.*

In an action on a policy of life insurance the defence was that the policy was never delivered, that it was not countersigned by the agent, contrary to the condition upon its face, and that the premium was never paid. On the trial an entry in the books of a payment to the agent was received in evidence, and the statement of the agent, made at a former trial, that the premium was not paid, was allowed to be read, the agent having since died. The policy offered in evidence contained the following condition: "This policy is not valid unless countersigned by \_\_\_\_\_, agent at \_\_\_\_\_. Countersigned this \_\_\_\_\_ day of \_\_\_\_\_.

Agent."

The evidence of the agent, which was read, in addition to stating the non-payment of the premium, was to the effect that the policy was only delivered to the deceased to be

examined, and that he did not countersign it because it was not actually delivered. The jury found a verdict for the respondent, but included in it a finding that the agent was instructed not to deliver the policy until it was countersigned. The Supreme Court of Nova Scotia sustained the verdict. See 1 C. L. T. 711. On appeal to the Supreme Court of Canada,

*Held*, per Ritchie, C.J., and Gwynne, J., that the policy was in the agent's hands merely as an escrow, not to be delivered until countersigned, and that condition not having been complied with, it was never an instrument duly executed and delivered by which the appellants could be bound.

Per Strong, J. The entry in the books of the deceased as to payment of the premium was improperly received in evidence and there should be a new trial.

Per Henry and Fournier, JJ. The countersigning of the policy was not a condition to which it was subject, and the appellants were estopped from denying that the premium was paid; and the jury having found that the policy was delivered, the plaintiff was entitled to retain his verdict.

The report of this case on a former appeal will be found in 10 S. C. R. 92.

*Beaty, Q.C.* and *C. H. Tupper*, for the appellants.

*J. H. Lyons*, for the respondent.

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MANITOBA.]

## FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

*Writ of Execution—Payment of amount to sheriff—Application of proceeds—Interest of third party in defendant's lands—Interpleader.*

In August, 1881, the H. B. Co. executed an agreement for the sale of certain lands to A. In March, 1883, A. conveyed the land to R., manager of the F. Bank. The trustees of a church corporation wishing to purchase the land, R. re-conveyed it to A. to enable him to get a deed from the Company and A. having obtained his deed on 4th August, 1883, executed a deed to such trustees. It was agreed that the F. Bank should receive a portion of the purchase money from

the church. On the same day that the deed to the trustees was executed the Bank of C., having a judgment against A., placed an execution in the sheriff's hands. The trustees paid to the sheriff the amount of the execution, believing that the same was a charge upon the land bought from A., and received a certificate from the sheriff that the land was free from execution. The F. Bank gave notice to the sheriff that they claimed the money, and an interpleader order was issued to try the title to it.

*Held*, affirming the decision of the court below, 2 Man. L. R. 257, that the money, having been paid to the sheriff on an execution duly issued, must be paid to the execution creditors, and a third party could not claim it.

*Semble*, that the lands were not "taken or sold" within the meaning of the Interpleader Act, and the proceedings were, therefore, improper.

*McCarthy*, Q.C., for the appellant.

*Robinson*, Q.C., for the respondent.

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BRITISH COLUMBIA.]

THE CANADIAN PACIFIC RAILWAY COMPANY  
v. MAJOR.

*Canadian Pacific Railway Act, 44 V. c. 1—Con. Ry. Act, 1879, s. 19—Inconsistent provisions.*

In the Act incorporating the Canadian Pacific Railway Co., 44 V. c. 1, the provisions of the Con. Ry. Act, 1879, are made applicable to the building of the Canadian Pacific Railway, in so far as they are not inconsistent with or contrary to the said Act of Incorporation.

*Held*, Henry, J., dissenting, that the provision contained in s. 19 of the Con. Ry. Act, 1879, that no railway company shall have any right to extend its line of railway beyond the termini mentioned in the special Act, is inconsistent with the power given to the company under s. 14 of said contract to build branch lines from any point within the Dominion, and with the declaration in s. 15 of the charter, that the main line, branch lines, and any extension of the main line thereafter constructed or acquired shall constitute the Canadian Pacific Railway.

The Canadian Pacific Railway Company have, therefore, a right to build their road beyond Port Moody in British Columbia, the terminus mentioned in said Act of Incorporation.

*Robinson, Q.C.* and *Tait, Q.C.*, for the appellants.

*Richards, Q.C.* and *Eberts*, for the respondent.

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## ONTARIO.

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### Supreme Court of Judicature.

#### COURT OF APPEAL.

IN CHAMBERS.

[OSLER, J.A., 7th December, 1886.]

WILKINS v. MACLEAN.

*Appeal bond—Surety—Officer of Court.*

*H. Cassels* moved for the allowance of bond filed as security for costs on the defendant's appeal to the Supreme Court.

*E. T. Malone* for the plaintiff, contra, objected that one of the sureties was an officer of the Court and therefore not a proper surety.

Osler, J.A., after reserving his decision, allowed the bond as sufficient.

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### High Court of Justice.

#### QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 23rd December, 1886.]

*In re* WALSH v. ELLIOTT.

*Division Court—Jurisdiction—Prohibition—Liquidated and unliquidated amounts—49 V. c. 15, s. 6.*

The decision of Wilson, C.J., 6 C. L. T. 592, was reversed on appeal.

Per Armour, J. The claims in question (\$75 on a promissory note and \$39, an open account) could not have been

sued together in a Division Court before 49 V. c. 15, and that Act does not expressly or impliedly affect the question.

Per O'Connor, J. But for 49 V. c. 15, s. 6, the case would be governed by *Vogt v. Boyle*, 8 P. R. 249; and although that enactment is not contradictory of but only inconsistent with the rule in that case, it must be presumed that the legislature intended to lay down a rule of combination which was to regulate the whole subject, and the enactment being silent as to the combination of such claims as are here sued on, they must be taken to be excluded from the jurisdiction.

*J. B. Clarke*, for the appeal.

*Shepley*, contra.

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[ARMOUR, J., 21st December, 1886.]

### BRODDY v. STUART.

*Constitutional Law—Insolvency—Property and civil rights—48 V. c. 26 (O)—Intra vires.*

*Held*, that the Act respecting assignments for the benefit of creditors, 48 V. c. 26 (O), is *intra vires* of the Ontario Legislature.

This action was brought by the assignee of a debtor to recover back money alleged to have been paid by the debtor to his creditor (the defendant), under the circumstances mentioned in the Act of the Legislature of Ontario, 48 V. c. 26, s. 2, and within one month before the execution of an assignment to the plaintiff for the general benefit of creditors under that Act. Section 2 of the Act is as follows:—  
 “Every gift, conveyance, assignment or transfer, delivery over or payment of any goods, chattels or effects, or of any bills, bonds, notes, securities, or of any shares, dividends, premiums, or bonus in any bank, company or corporation, or of any other property, real or personal, made by any person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay, or prejudice his creditors, or to give to any one or more of them a preference over his other creditors, or over any one or more of them, or which has such effect, shall as against them be utterly void.”

The action was brought under sec. 3, s-s. 3, of the Act, which is as follows :—“ In case a payment of money is made to a creditor under the circumstances mentioned in the second section, and within one month before the execution of an assignment for the general benefit of creditors under this Act, the same shall be void as against the assignment, but not as against persons claiming in any other way.” The defendant demurred to the statement of claim, on the ground that the Act in question was *ultra vires* of the Ontario Legislature, being legislation concerning bankruptcy and insolvency.

*Parkes* supported the demurrer.

*Aylesworth*, for the plaintiff.

*E. F. B. Johnston*, for the Attorney-General of Ontario.

ARMOUR, J.—The purport of the Act is to take a certain kind of assignment out of the operation of R. S. O. cap. 118 and the Statutes of Elizabeth, which admittedly deal with property and civil rights. Besides, how can it be said that this Act deals with insolvency when there is no compulsory liquidation, no enforced taking of a debtor's estate from him for distribution among creditors, no proceedings *in rem*, and no discharge of the debtor? I think the Act was within the competence of the Provincial Legislature, and I overrule the demurrer with costs. The proceedings will be stayed to enable the defendant to appeal, and he is to have leave to plead if his demurrer does not succeed in the end.

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## CHANCERY DIVISION.

[THE DIVISIONAL COURT, 6th December, 1886.]

### THOMPSON v. GORE.

*Marriage settlement, consideration for—Voluntary act—Fraud on creditors.*

In an action brought by the plaintiffs on behalf of themselves and all the other creditors of J. G., against J. G., his wife, and J. K. B. the trustee, to set aside a marriage settlement, by which J. G. a day or two before his marriage had settled the greater part of his property on his wife, it was shown that the relations between J. G. and his wife before

the marriage were very little short of those of husband and wife, and that she would have accepted a proposal of marriage without hesitation without any condition of a marriage settlement, and that J. G. was in insolvent circumstances, of which fact she must have been aware, and that the settlement was purely voluntary on the part of the husband, and that the wife knew nothing of it until she was asked to sign the deed.

*Held*, affirming the decision of O'Connor, J., at the trial, that the settlement was not the consideration or part of the consideration of the marriage, and that it could not be supported.

*Commercial Bank v. Cook*, 9 Gr. 524 and *Columbine v. Penhall*, 1 Sm. & G. 228, referred to and followed. *Fraser v. Thompson*, 1 Gif. 49, distinguished.

*G. T. Blackstock* and *T. P. Galt*, for the plaintiffs.

*Lount*, Q.C., *Falconbridge*, Q.C., and *A. H. Marsh*, for the defendants.

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[Boyd, C., 24th November, 1886.]

### BERRIE v. WOODS.

*Landlord and tenant—Covenant running with land—Covenant to pay for permanent improvements at termination of lease.*

J. P. demised certain lands to the defendant for ten years by deed of lease, which lease contained the following clause: "At the expiration of the lease the lessor, his heirs and assigns will pay or cause to be paid to the said lessee, etc., one-half the then value of any permanent improvements she may place upon the said lands, provided however if the said lessor, his heirs and assigns, at the expiry of the term, grant a new lease for a further period of five years said improvements shall belong to said lessor, his heirs or assigns." Pending the term of ten years J. B. conveyed the lands to the plaintiffs in fee as tenants in common who, at the expiration of the said term, demanded possession from the defendant, who thereupon made a claim with respect to improvements under the above clause in the lease.

**Held**, that the liability to pay for the improvements ran with the land and attached as an equitable lien thereon against the plaintiffs.

Judgment was accordingly given that possession was to be delivered forthwith to the plaintiffs, subject to a lien on the property for value of the defendant's improvements under the terms of the lease. Lien to attach on the title which J. B. had prior to the deed to the plaintiffs. Reference to the Master to fix the value of the improvements.

*Moss, Q.C., and Meek*, for the plaintiffs.

*C. Millar*, for the defendant.

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[30TH NOVEMBER, 1886.]

### NATIONAL INSURANCE CO. v. McLAREN.

*Insurance—Subrogation—Action against wrongdoer—Estoppel by judgment  
Res inter alios actæ.*

The defendant, who owned a lumber yard, insured his property with a number of insurance companies, the value of his whole insurance amounting to \$50,000.

In May, 1879, his property was set on fire by sparks from an engine of the Canada Central Railway Company, and a large portion destroyed. The amount of his loss exceeded the \$50,000 insured, and he claimed and obtained from the insurance companies the whole amount of his insurance, viz. \$50,000. Afterwards, on 22nd September, 1879, he commenced an action for damages against the railway, and in March, 1882, he recovered against the railway \$100,000 damages and his costs of suit. It appeared that the jury in this last mentioned action had been asked specifically what was "the actual value of the lumber destroyed," to which they gave the answer "\$100,000, including ties and rails." The plaintiffs in the present action, who were some of the said insurance companies, now claimed that the defendant obtained from the railway company by his said verdict a sum larger than the difference between the amount of the insurance and the amount of his loss, and that he, the defendant, was a trustee for that excess for the plaintiffs respectively in proportion to the amount of their insurances. They contended that their right to be subrogated to the rights of the



defendant (the railway company) arose when they (the plaintiffs) made payment of the insurance money to the defendant, and that he then became trustee for them *pro tanto*, and in this character prosecuted his litigation against the railway company, and as a consequence from this they argued that the finding of the jury as to the actual total loss was binding and conclusive on the defendant, as well as on them, the plaintiffs, because as beneficiaries they were privies to that judgment, and therefore they said the defendant was now estopped from proving in this action that his actual loss was more than \$100,000. The defendant, however, denied that \$100,000 correctly represented the whole of his loss, which he asserted exceeded the whole \$150,000, which he had received from the insurance companies and the railway.

*Held*, that the defendant was not concluded by the finding of the jury in his action against the railway company, and that the utmost right of the plaintiffs here was to have the amount recovered as damages from the railway company brought into account, together with the moneys previously paid by the plaintiffs for insurance, in order to ascertain whether the defendant had been more than fully compensated for his total loss by fire and other loss and outlay connected with the litigation, and for these purposes the matter was referred to the Master.

The right of subrogation being an equitable right partakes of all the ordinary incidents of such rights, one of which is that in administering relief the Court will regard not so much the form as the substance of the transaction. The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company, but it is a begging of the question to assert that he is a trustee from the time of payment by the insurers.

*Robinson, Q.C., and J. F. Smith, Q.C., for the plaintiffs.*

*McCarthy, Q.C., and A. R. Creelman, for the defendant.*

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## WYLD v. CLARKSON.

*Guaranty—Creditor's right to rank on two estates in hands of assignees—  
Valuing security—48 V. c. 26 (O.)*

The plaintiffs supplied B. with goods on the guaranty of M., who made an assignment for the benefit of creditors under 48 V. c. 26 (O.), on 20th March, 1886. B. assigned in like manner on 30th March, 1886. On 6th April the plaintiffs proved their claim for the full amount on his estate, and stated that they held as security their claim against B.'s estate but did not value it. On 8th April B. effected a compromise with his creditors at fifty cents on the dollar and gave composition notes therefor. The defendant, M.'s assignee, claimed that the plaintiffs should value their security and refused to pay their dividend until they did. Upon a special case being stated for the opinion of the Court,

*Held*, that by B.'s assignment her estate was placed *in custodia legis* protected from judgments and executions and available for the creditors who were thus potentially seised of their proper proportion of the assets. The original personal claim was thus transmitted into a claim *in rem*, and so could fairly be regarded as in the nature of a security which the plaintiffs were bound to value.

*Geo. Kerr*, for the plaintiffs.

*Foy, Q.C.*, for the defendant.

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[23RD DECEMBER, 1886.]

## SHEPHERD v. THE CANADIAN PACIFIC R. W. CO.

*Award, appeal from—Time—Filing—R. S. O. c. 50, ss. 191, 192, 193.*

In the case of a voluntary submission to arbitration at *nisi prius* in which a right of appeal is reserved by consent, the procedure is governed by R. S. O. c. 50, ss. 191, 192, and 193, and the time for appealing from the award runs from the date of filing, and not from the date of making the award.

*McEwan v. McLeod*, 46 U. C. R. 235, followed.

*A. H. Marsh*, for the plaintiff.

*George Macdonald*, for the defendants.

[PROUDFOOT, J., 23rd October, 1886.]

## ARCHER v. SEVERN.

*Will—Specific bequest of a mortgage indebtedness—Right of executors to refuse to discharge until other indebtedness paid—Assent of executor to specific legacy—Administration.*

A testator by his will directed his executors to cancel and entirely release the indebtedness of his son W. S. upon and by virtue of a mortgage to the testator, such release to operate and take effect immediately on and from the said testator's death. In an action for the administration of the testator's estate W. S. claimed the discharge of the mortgage, but the executors contended that they were not bound to give it until W. S. paid the amount of his other indebtedness to the estate. The Master in Ordinary found in favour of the executors.

*Held*, reversing the finding of the Master, that the executors were not entitled to insist on payment of the other indebtedness before discharging the mortgage.

*Held*, also, following *Northy v. Northy*, 2 Atk. 77, that although at law the assent of the executors is necessary to the vesting of a specific legacy, in equity he is considered as a bare trustee, and if he refuse his assent without cause he may be compelled to give it, and that here the executor's refusal was without cause.

*Held*, also, that a decree in an administration suit, although it may enure to the benefit of all creditors of an estate, does not prevent the Statute of Limitations from running against debtors to the estate.

*Held*, also, that a clause in the answer of W. S. expressing his willingness that the will should be construed by the Court and the rights of the parties determined, had not the effect of waiving any right that might have accrued to him during the progress of the suit.

*W. H. P. Clement*, for the appeal.

*S. H. Blake, Q.C.*, and *H. Cassels*, contra.

[22ND NOVEMBER, 1886.]

## McMULLEN v. POLLEY.

*Principal and agent—Solicitor and client—Right of solicitor to receive money from client.*

M., a solicitor, on the pretence of obtaining an advance of \$6,200 for the plaintiff, on mortgage of the plaintiff's lands,

procured the plaintiff and his wife to execute a mortgage for that amount. P. the mortgagee actually paid the money to M., and got from him the mortgage and had it registered, but M. absconded without paying over the money to the plaintiff, who now sued the defendant therefor, or in the alternative for a release of the mortgage, and reconveyance of the land.

*Held*, that the mortgage being left in the hands of M. did not prove that he was an agent of the plaintiff to receive the money from the defendant, and since the plaintiff denied having given M. any authority to receive the money, and the defendant had not proved the agency of M. to receive the money (the *onus* of proving which rested on him), therefore, the plaintiff was entitled to judgment with costs.

*Walkem, Q.C.*, and *McIntyre, Q.C.*, for the plaintiff.

*Britton, Q.C.*, and *Whiting*, for the defendant.

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[1ST DECEMBER, 1886.]

### SKINNER v. AINSWORTH.

*Presumption of death—Specific performance—Mortgage, refusal to execute—Dower—Costs.*

It was a term of a contract for purchase by plaintiff of defendant's lands, made in January, 1873, that plaintiff should give a mortgage for \$400, part of the purchase money, payable to the survivor of the defendant and one Annie A., at the death of the other, in order to secure the plaintiff against any claim for dower by Annie A.

Specific performance of the contract was decreed in November, 1874, with the variation that the mortgage was to be to the accountant of the Court.

On the 17th February, 1875, the plaintiff obtained possession by means of a writ of assistance, but he never executed the mortgage or paid interest upon the amount of it.

In March, 1876, an order was made that the mortgage to the accountant should be held in Court subject to the claims of one Elizabeth A., in order to protect the plaintiff against any claim that she might make as to dower, which she had declined to bar: 24 Gr. 148.

The defendant denied that he had ever been married to Annie A. It was shewn upon the presentation of a petition

by the defendant, that Annie A. had not been heard of for more than 26 years, that Elizabeth A. had executed a release of dower, which had been offered to the plaintiff, and that the plaintiff had been tendered a mortgage to the accountant and had refused to execute it.

*Held*, that the death of Annie A. must be presumed, and that the defendant was entitled to be paid \$400, and interest from the 17th February, 1875, (less the plaintiff's costs of getting possession); and that the plaintiff, having refused to execute the mortgage, should pay the costs of the application.

*H. Cassels*, for the defendant.

*Langton*, for the plaintiff.

H. C.

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[FERGUSON, J., 8th November, 1886.]

### JENKINS v. DRUMMOND.

*Will, construction of—Devise to children—Period of division.*

S. P. by her will provided as follows:—"Also I will and ordain that my said (property) after the death of my before mentioned daughters E. O. W. and S. A. W. be sold \* \* and the proceeds \* \* be divided between the children of my daughters E. O. W., M. K., and S. A. W. \* \* one-third to the children of the said E. O. W., one-third to the children of the said M. K., and one-third to the children of the said S. A. W., share and share alike, and in case of the decease of one of the said families of children, as aforesaid, then I will and ordain that the said proceeds \* \* be equally divided between the two remaining families, the children of each family receiving share and share alike of such half to each family." At the time of the making of the will M. K. was dead, leaving three children who survived the testatrix. S. A. W. survived E. O. W. and died in 1886, many years after the death of the testatrix. All three of the children of M. K. predeceased S. A. W., two of them intestate and without issue, and one leaving two children who survived S. A. W. E. O. W. had three children, one of whom died childless before the testatrix, and the other two survived S. A. W. S. A. W. had several children, one of whom died during her lifetime leaving children, and the others all survived her.

*Held*, that the period of distribution was the time of the death of S. A. W., and that the children of E. O. W. and S. A. W. then living were entitled to the whole of the property, one moiety to each family, the members of each family sharing equally their moiety.

*G. M. Evans*, for the plaintiff.

*Walkem*, Q.C., for the children.

*Delamere*, for the grandchildren.

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[22ND NOVEMBER, 1886.]

### HOLMES v. MURRAY.

*Will. construction of—Devise—Republication of will by codicil—Mortmain—*  
*R. S. O. c. 216—38 V. c. 75 (O.).*

A testator made his will, dated 2nd February, 1884, in which was contained the following devise:—"To the congregation of Burns' Church \* \* \* I bequeath the sum of \$2,000 to be used by the trustees of the said church towards the purpose of purchasing land for a glebe in any place that they may judge suitable, and for erecting thereon a Manse, all for the use of the said congregation through their trustees forever." He added two codicils on 21st September and 5th December, 1885, respectively, and died on the 27th of December following.

*Held*, that as nothing appeared in the codicils to show a contrary intention, their execution operated as republications of the will at their respective dates, and that the will having been so republished within six months of the death of the testator, the gift notwithstanding the provisions of R. S. O. c. 216 and 38 V. c. 75 (O.) was void.

*Oliver*, for the plaintiffs, the executors.

*J. Maclellan*, Q.C., for the defendants, the trustees.

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### COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 24th December, 1886.]

### STEWART v. SULLIVAN.

*Staying proceedings—Interlocutory costs—Default—Practice in Equity and at Common Law.*

In equity, if interlocutory costs payable by the plaintiff remained unpaid, the Court might, but was not bound to, stay proceedings, and would not if it were not equitable to do so.

At Common Law, while non-payment of such costs was not a ground for staying proceedings, yet if it appeared equitable to stay proceedings until they were paid, the Court in the exercise of its inherent jurisdiction might direct a stay.

The Common Law Practice is the more convenient one and should now be followed.

And where the plaintiff served in succession four notices of trial for the same assizes, all of which were set aside as irregular, with costs against him, and he was in default for non-payment of such costs, the action was stayed until they should be paid.

*Aylesworth*, for the plaintiff.

*McIntyre*, Q.C., for the defendant.

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#### TOMLINSON v. NORTHERN R. W. CO.

*Costs—Third party—Appeal—Discretion—Judicature Act, s. 32.*

*Held*, that the order of Armour, J., 6 C. L. T. 487, refusing the third parties their costs, was made in the exercise of a discretion which by s. 32 of the Judicature Act was not subject to review without leave, and as no such leave had been given, an appeal from the order was dismissed, with costs.

The Court directed that such part of the costs incurred by the third parties in establishing the defence as might properly have been incurred by the defendants, should be allowed by the taxing officer.

*W. H. P. Clement*, for the plaintiffs.

*Boulton*, Q.C., for the defendants.

*Tilt*, Q.C., for the third parties.

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#### IN CHAMBERS.

[WILSON, C.J., 29th October, 1886.]

#### REGINA v. MEYER.

*Criminal law—Refusing to provide for wife and children—Defendant a competent witness in his own behalf before a magistrate—Magistrates' powers and duties—32 & 33 V. c. 20, s. 25; 49 V. c. 51, s. 1.*

Under 32-33 V. c. 20, s. 25, as amended by 49 V. c. 51, s. 1, the defendant was charged by his wife, before a magistrate,

with refusing to provide necessary food, clothing, and lodging for herself and children. At the close of the case for the prosecution the defendant was tendered as a witness in his own behalf. The magistrate refused to hear his evidence, not because he was the defendant, but because he did not wish to hear evidence for the defence; and subsequently committed him for trial.

*Held*, that the defendant's evidence should have been taken for the defence, that a magistrate is bound to accept such evidence in cases of this kind, and give it such weight as he thinks proper, and that the exercise of his discretion to the contrary is open to review and correction.

*Held*, also, that the amended section of the Act is intended to enlarge the powers and duties of magistrates in cases of this nature, and that the word "prosecution" therein includes the proceedings before magistrates as well as before a higher Court.

*E. F. B. Johnston*, for the Attorney-General.

*King*, for the defendant.

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[BOYD, C., 20th December, 1886.]

## LONDON & CANADIAN L. & A. CO. v. SMYTHE.

*Interest post diem—Mortgage action—Redemption—Sale.*

A mortgagee seeking foreclosure in an action brought after maturity of the mortgage, in which a sale is decreed and the estate sold, is entitled to be paid interest at the mortgage rate after maturity, as well as before, and until he is paid out of the purchase money.

*Powell v. Peck*, 6 C. L. T. 430, dissented from.

An appeal by the plaintiffs from the ruling of the Master in Ordinary as to the rate of interest to be allowed them in taking subsequent accounts in a mortgage action for foreclosure.

The rate of interest in the plaintiffs' mortgage was eight per cent., and the proviso for payment of interest was as follows: "Interest on the unpaid balance at the rate aforesaid \* \* in advance."

At the time the action was brought the mortgage had matured.



Pending the action the Federal Bank, who were subsequent encumbrancers, paid \$80 into Court, and obtained an order for a sale instead of foreclosure.

On the 22nd of October, 1885, the Master made his report fixing the 23rd of April, 1886, as the day of redemption, and made up the sum due the plaintiffs, as redemption money upon that day, allowing interest at eight per cent.

There was default in payment on that day, a final order of sale was issued, and a sale took place, at which the Federal Bank became the purchasers.

On the 9th December, 1886, the Master proceeded to take the subsequent accounts and certified that he allowed the plaintiffs interest from the 23rd of April till payment at the rate of six per cent. only, following the judgment of Proudfoot, J., in *Powell v. Peck*, 6 C. L. T. 530.

The plaintiffs appealed from this certificate.

*Arnoldi* for the appeal. The subsequent account is merely a carrying out of the report of the 22nd of October, 1885. The principle was decided by that report and gives the rule for this case. That report was not appealed against. It was the Federal Bank who, by coming in and demanding a sale, caused the delay for the time which the subsequent interest covers. The plaintiffs should not be the sufferers by this delay. The words of the proviso in the mortgage in question are sufficiently explicit to shew that the plaintiffs are entitled to interest after maturity at the mortgage rate.

*D. W. Saunders*, for the Federal Bank, contra.

The following cases were referred to:—*St. John v. Rykert*, 10 S. C. R. 278; *Powell v. Peck*, 6 C. L. T. 530; *Muttlebury v. Stephens*, 6 C. L. T. 588; *Craig v. Phillips*, 7 Ch. D. 249; *Brown v. Barkham*, 1 P. Wms. 652; *Elton v. Curteis*, 19 Ch. D. 49; *Harris v. Harris*, 3 Atk. 721; *Simonton v. Graham*, 1 C. L. T. 339; *Cook v. Fowler*, L. R. 7 H. L. 27; *Dalby v. Humphrey*, 37 U. C. R. 514; *Re Roberts*, 14 Ch. D. 49.

BOYD, C. There is a very plain distinction between a plaintiff recovering on the covenant in a mortgage, and a plaintiff allowing himself to be redeemed. Full restitution must be made at the mortgage rate before redemption. If the mortgage rate were exorbitant the Court might not impose the term of full payment; but here it is not excessive, and the plaintiff is entitled to be paid at that rate. The circumstance

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that the rate was fixed by a previous report not appealed against, is also of importance, and no reason is shewn why that rate should not be adhered to. My decision conflicts with that of my brother Proudfoot in *Peck v. Powell*, and I should be glad if some case of the kind could be taken before an appellate tribunal to obtain a binding decision. The interest should be at the rate of eight per cent., and the appeal is allowed, but without costs owing to the conflicting decisions.

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[23RD DECEMBER, 1886.]

*In re* REDDAM.

*Devolution of Estates Act, 1886—Widow's interest in realty.*

The effect of the Devolution of Estates Act is to abolish the distinction between real and personal property for the purposes of administration, and to cast the whole estate upon the personal representative. The 4th section gives the widow who elects against her dower the same share in the realty that she has in the personalty, and to the same extent.

Remarks on the practical working of the Act.

AN application under the Devolution of Estates Act, 49 V. c. 22, for an order for the sale of the property of a deceased intestate, made on behalf of the widow and administratrix.

*Huson W. M. Murray*, for the applicant.

*Malone*, for a lunatic son of the deceased.

*J. Hoskin, Q.C.*, for an infant son.

BOYD, C. Questions arise as to the right of the widow under proceedings taken with the privity of the official guardian, under the late Act as to the devolution of estates (49 V. c. 22). She elects against dower and claims a share of the land under s. 4, s.-s. 1. The effect of the Act is to abolish the distinction between real and personal property for the purposes of administration, and to cast the whole estate upon the personal representative. No greater change has been effected in the law by any recent legislation. When its far reaching consequences are properly apprehended it may be found that the absorption of realty by personalty tends to systematize jurisprudence in much the same way as the absorption of law by equity.

I read the 4th section as giving the widow, who resigns her dower, the same share in the realty that she now has in the

personalty, and to the same extent, that is to say, she is not restricted to a mere life estate, but takes absolutely out and out. So far as the infants and the lunatic are concerned, it will be right to present a scheme, shewing how it is proposed to deal with and divide the property, in order that the judge may see to the protection of their interests. This is also the duty devolving upon the official guardian under s. 8 of the Act. When the sale of land in which infants are interested is proposed by the executors, it is competent for that officer to see that the minors' shares are, or will be, properly invested and protected. In cases of doubt the matter can always be referred to the Court and thereby proper measures taken to secure the proceeds by payment into Court or otherwise. My brother Ferguson concurs in the general results herein indicated, and refers me to *Mitchell v. Ritchie*, 13 Gr. 445, 451, as to the care to be exercised over infants' money.

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[GALT, J., 14TH DECEMBER, 1886.]

BURGESS v. CONWAY.

*Appeal bond, liability on after appeal allowed—Further appeal pending—Ex parte motion.*

*Held*, affirming the judgment of the Master in Chambers, that a judgment by the Court of Appeal in favour of a defendant appellant puts an end to all liability upon the appeal bond, which may after such judgment be delivered up to the appellant, even where the other party has given notice of appeal to the Supreme Court of Canada.

*Held*, also, that notice should be given to the opposite party of a motion to take the appeal bond off the files.

*Aylesworth*, for the plaintiff.

*George Kerr*, for the defendant.

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[ARMOUR, J., 21ST DECEMBER, 1886.]

MACGREGOR v. McDONALD.

*Disobeying order—Contempt—Appeal—Staying proceedings.*

It was held by the Master in Chambers that a party who has been ordered by the Court to attend for further examina-

tion, after a refusal to answer questions, is in contempt if he does not so attend, but that is not a bar to his appealing from the order.

The Master however refused to stay proceedings under the order pending the appeal.

On appeal from the refusal to stay proceedings, Armour, J., affirmed that part of the order.

*MacGregor*, for the plaintiff.

*H. Cassels*, for the defendant.

[ROSE, J., 18TH DECEMBER, 1886.]

### DAYFOOT v. BYRENS.

*Judgment debtor—Examination—Appointment—Objection, waiver of.*

Motion by plaintiff to commit the defendant for unsatisfactory answers on his examination as a judgment debtor.

*W. H. P. Clement*, for the defendant, admitted that the answers were insufficient and submitted to have defendant re-examined, but objected that the defendant had not been served with an appointment signed by the examiner, according to the practice laid down in *Meyers v. Kendrick*, 9 P. R. 363, and claimed that there should be no costs.

*H. Cassels*, for the plaintiff, contended that the defendant had waived the objection to what was a mere irregularity by attending on the examination and submitting to be examined, and by his omission at that stage to take the objection; referring to Arch. C. L. Pr., 14th Ed., 446-7; Daniell's Chy., 6th Ed., 907-8.

Rose, J., after reserving judgment, held that the attendance was a waiver of the objection, and ordered defendant to attend for further examination at his own expense, and to pay the costs of his refusal to be examined, including the costs of the motion.

[THE MASTER IN CHAMBERS, 8TH DECEMBER, 1886.]

### DART v. CITIZENS' INS. CO'Y.

*Defence—Jurisdiction—Service—Appearance.*

The defendants appeared to the writ of summons, and set up in the statement of defence that the High Court of Justice had no jurisdiction; that the cause of action arose in

Winnipeg, the defendants' head office was at Montreal, and the service of process was on their agent for local purposes at London.

*Held*, that there was nothing in these facts to shew want of jurisdiction, and that the appearance had precluded all question as to the sufficiency of the service.

*Rae*, for the plaintiff.

*Aylesworth*, for the defendants.

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[21ST DECEMBER, 1886.]

### WILKINSON PLOUGH CO. v. GARRETT.

*Costs—Judgments against two defendants at different stages.*

In an action against two defendants for the price of a machine, the plaintiffs signed judgment for default of appearance against the defendant Richards for the whole amount claimed against both defendants, but did not at the time tax costs against him. The defendant Garrett defended the action, but judgment was finally entered against him, also for the full amount claimed, with costs, but no special direction was given as to the taxation of costs against the two defendants.

*C. C. Robinson*, for the plaintiffs, applied for a direction as to the taxation of costs.

THE MASTER IN CHAMBERS ordered "that the whole costs of action be taxed against the defendant Garrett, including the costs of entering judgment by default against the defendant Richards; costs up to and including such judgment to be also taxed against the defendant Richards, and if recovered from either party to be credited on the judgment against both."

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## NEW BRUNSWICK.

### In the Supreme Court.

EX PARTE GOODINE.

*Indian Act, 1880—Conviction—Liquor sold to Indians otherwise than on board of vessels—Whether imprisonment can be adjudged for non-payment of fine.*

Imprisonment in case of immediate non-payment of a fine imposed under s. 90 of The Indian Act, 1880, can only be ad-

judged where the offence is selling liquor to Indians on board a vessel.

In other cases, the conviction must follow the form (I 1), in the Summary Convictions Act, 32 & 33 V. c. 31, and award a distress in default of payment of the fine.

Where a justice exceeds his jurisdiction in prosecutions under The Indian Act, a *certiorari* is not taken away by s. 97, or by the Act 47 V. c. 27, s. 15.

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### DELONG v. BURRELL-JOHNSON IRON CO.

*Master and Servant—Injury to servant of sub-contractor—Negligence by servant of principal contractor—Fellow-servants—Contributory negligence.*

Defendant having agreed with the town of W. to construct waterworks for the town, sub-let to P. the digging of the trenches for the water-pipes, and refilling them after the pipes were laid. P. employed the plaintiff in that work, part of his duty being to see that the earth was clear from the end of each pipe so that the joints could be caulked, and while he was in the trench attending to his duty, an iron pipe which was being put into the trench by the defendant's servants, fell upon him and injured him. The usual mode of lowering the pipes into the trench was by means of ropes at each end, whereby the pipes were let down gradually; but on this occasion, only one rope was used, the other end of the pipe being pried in with a handspike, in consequence of which it fell into the trench suddenly, and struck the plaintiff. The men in charge of the pipe knew, or ought to have known, that the workmen were in the trench at the time.

*Held*, 1. That the plaintiff having been employed and paid by P. was his servant, and not the fellow-servant of the men who caused the injury.

2. That there was negligence on the part of the defendants' servants in the manner of putting the pipe into the trench.

3. That there was no evidence of contributory negligence on the part of the plaintiff, and that he was entitled to recover.

## LA BANQUE NATIONALE v. BECKETT.

*Banking Act, 34 V. c. 5—Continuation of Bank charters—Right of Banks to sue—Pleading.*

The Banking Act (34 V. c. 5) continues the charters of the Banks enumerated in a schedule to the Act, and authorizes them to discount bills and notes, and to transact business at any place in the Dominion.

In an action by such a Bank as indorsees of a promissory note, it is not necessary to produce the charter of the Bank to shew their right to sue.

*Semble*, that if the existence of the corporation is not denied by plea, it is admitted.

*The Avon Stone Co. v. Dunham*, 2 P. & B. 460, and *The Waterous Engine Works Co. v. Campbell*, 22 N. B. Rep. 503. distinguished.

## ROSE v. SCHOFIELD.

*Insolvent Act, 1875—Power of assignee to sell debts—Promissory notes given to assignee—Statute, when directory.*

An assignee under the Insolvent Act of 1857 took negotiable notes payable to himself, from a debtor of the estate, and after they fell due, sold and endorsed them to the plaintiff, together with other notes, for much less than their nominal value, without any authority from the creditors or the inspector.

*Held*, per Allen, C.J., Wetmore and Fraser, JJ., King, J., *hesitante*, and Palmer, J., dissenting, that the assignee had no power to sell the notes without such authority under section 67 of the Act, and that no title vested in the plaintiff as indorsee.

Per King, J. The notes having been indorsed after maturity, it might be shown that the assignee had no right to indorse.

Per Palmer, J. Even if no property in the notes vested in the plaintiff by the sale, he could sue in his own name, as the agent of the assignee.

## DUE DEM. MAYOR, &amp;c., OF ST. JOHN v. MONTAGUE.

*Ejectment for non-payment of rent—Judgment against casual ejector—  
Whether necessary to shew how the tenant holds.*

In ejectment for non-payment of rent, under the Consol. Statutes, cap. 83, sec. 19, after judgment against the casual ejector, where the tenant in possession is not the lessee, it is not necessary to shew that he claims under the lessee, or how he hold possession.

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## EX PARTE DIBBLEE.

*Act 45 V. c. 78, (Town of Woodstock), Mayor's authority to grant business licenses to non-ratepayers—Whether Act intra vires Provincial Legislature.*

The Act 45 V. c. 78, providing that no person, who is not a ratepayer in the Town of Woodstock, shall engage in any trade, profession, occupation, business or calling therein without a license from the Mayor, is *intra vires* the Provincial Legislature, under the 92nd section of the British North America Act. *Ex parte Fairbairn*, 2 P. & B. 4, followed.

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## MANITOBA.

## In the Queen's Bench.

[THE FULL COURT.]

## McARTHUR v. MACDONELL.

*Action against administrator—Plene administravit—Costs.*

In an action upon covenant and in debt against an administrator, the defendant pleaded as to \$5,000, payment, and to the whole declaration certain outstanding judgments and *plene administravit præter*.

The plaintiff succeeded upon the plea of payment and the defendant succeeded upon the other plea.

*Held*, Killam J., dissenting, affirming the decision of Taylor, J., that the plaintiff was entitled to the general costs of the action, and the defendant to the costs of the issue upon which he was successful.



## WAY v. THE MASSEY MANUFACTURING CO.

*Fraudulent conveyance—Grantor remaining in possession.*

A lease made by a debtor of his farm property, under the terms of which the debtor was to remain in possession, and out of the crop pay himself \$1,500, was declared void as against creditors, although there was no evidence of financial embarrassment or inability to pay debts in full.

This was an interpleader issue to try the title to certain wheat, oats, barley, etc. The claimant claimed under a lease of the farm under which the grantor was to remain in possession, farm the land, out of the crop pay himself \$1,500, etc. The only evidence as to the debtor's financial condition at the date of the execution of the lease was that the debtor owned 640 acres of land of which between 400 and 500 were broken. He also owned several horses, oxen, etc. As against this, the issue showed that there were three executions against his goods, two of which had been four months and the third three months in the hands of the sheriff. The amounts did not appear. There was no proof of any execution against lands. At the trial Killam, J., entered a verdict for the defendants—the execution creditors, and the full Court affirmed the decision.

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## McEDWARDS v. THE OGILVIE MILLING CO.

*Wrongful dismissal—Hiring by corporation not under seal—Power of director—Drunkenness.*

The defendants, a company chartered under the Joint Stock Companies Act, Con. Stat. Man. c. 9, Div. 7, through its officers, who usually made such contracts, hired, by parol, the plaintiff to manage their elevator and business at Manitou.

*Held*, 1. The contract need not have been under seal (s. 269 of the statute), if made by an official in general accordance with his powers "under the by-laws or otherwise."

Per Taylor, J. The plaintiff having been hired by those officials who hired all the persons holding positions similar to that of the plaintiff, there was evidence to go to the jury as to whether the contract had not been made "by an agent, officer or servant of the company in accordance with his powers, as such officer, under the by-laws of the company or otherwise."

Per Killam, J. From the mere fact of acquiescence in the exercise of such powers (by the official), or from the acquiescence of the company in the plaintiff's appointment, it may be inferred that all formalities necessary to give the official authority to make the appointment had been duly observed.

2. Acquiescence of the directors in the act of an official in dismissing the plaintiff, coupled with the substitution of another employee also acquiesced in by the directors, which official had authority to hire the plaintiff, is evidence of authority to dismiss.

By s. 47, "The directors shall from time to time, elect from among themselves a president of the company; and shall also appoint and may remove at pleasure all other officers thereof."

*Held*, 1. That this clause did not apply to the plaintiff.

2. Such power of removal must be strictly pursued, and only at a regular meeting of the directors.

Per Killam, J. A dismissal in such manner must be pleaded.

The proper question to be left to the jury upon a justification of the dismissal for drunkenness would be: "Was the plaintiff so conducting himself that it would have been injurious to the interest of the defendants to have kept him; did he act in a manner incompatible with the due and faithful discharge of his duty; did he do anything prejudicial or likely to be prejudicial to the interest or reputation of his master?"

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### CALDER v. DANCY.

*Notice of trial by defendant—Non-suit where plaintiff does not appear.*

A defendant may pass and enter the record and give notice of trial for the assizes as well as for any Tuesday.

When the plaintiff does not appear at the trial a non-suit may properly be entered.

The defendant is not in such case entitled to a verdict.

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### UNION BANK v. McKILLIGAN.

*Promissory note—Presentment—Notice of dishonour—Post office box.*

The plaintiffs were the holders of a note endorsed by the defendant payable at the plaintiffs' bank on the 15th of September.

On the 13th of September a change of managers of the bank had taken place, and the new manager, although the note was in the Bank during the whole of the 15th, knew nothing of its existence until the afternoon of the 16th. He then caused the note to be protested and a notice addressed to the defendant put in the post office. This notice was placed in a box rented by the defendant from the post office authorities before six o'clock on the same afternoon.

*Held*, that there had been sufficient presentment and notice of dishonour.

[TAYLOR, J.]

McMAHON v. BEGGS.

*Dismissal for not reviving—Costs.*

Where one of several plaintiffs dies, the order is that the survivor do revive within a limited time, and in default the bill is dismissed with costs.

In the case of a sole plaintiff the bill is dismissed without costs in case of failure to revive.

[KILLAM, J.]

MACDONALD v. McARTHUR.

*Discovery as to accounts before decree.*

In a partnership bill there were some general charges of misapplication and misappropriation of moneys. The right to a decree for account was conceded, but the defendants refused, upon examination, to answer questions based upon the general charges.

*Held*, 1. That the defendants were bound to answer, even though the question related to matters that would be referred to the Master and not be determined at the hearing. *Elmer v. Creasy*, L. R. 9 Ch. 69, approved.

2. Although the charges might not have been sufficiently specific upon demurrer, yet the defendants having answered, they were precluded from refusing to answer fully.

3. Some of the questions were directed to the defendants' dealings with the "Pruden farm." The defendants swore that this farm was not an asset of the firm, but they were nevertheless ordered to give full discovery respecting the property.

*Monkman v. Robinson*, 3 M. L. R., distinguished.

## IN CHAMBERS.

## BAYNES v. METCALFE.

*Security for costs—Praecipe order.*

The clerk of records and writs has power to issue upon *praecipe* an order for security for costs, where from the bill the plaintiff's residence appears to be without the jurisdiction.

## PRINCE EDWARD ISLAND.

## In the Supreme Court.

[11th DECEMBER, 1886.]

*In re* JOHN JOY.*Canada Temperance Act—Certiorari—Interest of Magistrate.*

This was an application by John Joy, who had been convicted before the stipendiary magistrate of the city of Charlottetown, of a breach of the Canada Temperance Act, for a writ of *certiorari* to remove the conviction into the Supreme Court, and to have it quashed on the grounds given below.

By the P. E. I. statute, 38 V. c. 6, the stipendiary magistrate's salary is to be paid out of the city funds, and by order in Council, made in September, 1886, before this prosecution was begun, the Dominion Government directed all fines recovered under the Canada Temperance Act, to be paid to the treasurer of the city or county in which they are recovered, to be applied towards the due administration of the Act.

Some days before the summons to Joy was issued, at the hearing against one D., it appeared in evidence that two of the witnesses had procured liquor from Joy and others on the night of the shooting. The magistrate then said "those parties must be brought up," *i.e.*, prosecuted. The city marshal thereupon laid an information against Joy, who was tried before the stipendiary magistrate and convicted of an offence against the Canada Temperance Act. The marshal and other policemen are under the supervision and control of the stipendiary magistrate.

Joy applied for a writ of *certiorari* on the following grounds =

1. That the stipendiary magistrate was the person who investigated the proceedings and instructed the prosecutor to bring the prosecution, and was therefore interested to such an extent as to be incompetent to adjudicate upon the case and the conviction was therefore void.

That the stipendiary magistrate's salary being payable out of the city funds, the fine leviable under this conviction being payable into these funds, and the ability of the city to pay such salary depending to some extent upon fines collected under this and other prosecutions, that he was therefore interested in such conviction to such an extent as to be disqualified to judge in this prosecution, and that the conviction was accordingly void and should be quashed.

3. That the prosecutor is a policeman, under the control of the magistrate who tried the case, is in fact his servant and that therefore the prosecution though in the name of such policeman, is in truth brought by the magistrate himself.

4. That the summons, by which the prosecution was commenced, contains the name of no person as prosecutor, and therefore the proceedings thereunder are void.

*Held*, by Palmer, C. J., and Hensley, J., Peters, J., dissenting, that the first three grounds were not sufficient to disqualify the magistrate to try the case either on account of any pecuniary or substantial interest or of any bias against the defendant; that the City Marshal was the proper person to bring the prosecution; and that it is not imperative that the name of the prosecutor should appear in the summons.

*Davies*, Q.C., showed cause to the rule.

*A. Peters*, for defendant, contra.

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## Supreme Court of Canada.

EXCHEQUER COURT.]

### BERLINQUET v. REGINAM.

*Petition of Right—Intercolonial Railway contract—31 V. c. 13, s. 18—*

*Certificate of engineer a condition precedent to recover money for extra work—Forfeiture and penalty clauses.*

The suppliants engaged by contracts under seal, dated 25th May, 1870, with the Intercolonial Railway Commissioners

(authorized by 31 V. c. 13) to build, construct, and complete sections three and six of the railway for a lump sum, for section three of \$462,444, and for section six of \$456,946.43.

The contract provided *inter alia*, that it should be distinctly understood, intended, and agreed that the said lump sum should be the price of, and be held to be full compensation for, all works embraced in or contemplated by the said contract, or which might be required in virtue of any of its provisions, or by-laws, and the contractors should not, upon any pretext whatever, be entitled, by reason of any change, alteration, or addition made in or to such works, or in the said plans or specifications, or by reason of the exercise of any of the powers vested in the Governor in Council by the said Act intituled, 'an act respecting the construction of the Intercolonial Railway', or in the commissioners or engineer by the said contract or by law, to claim or demand any further sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and every such claim or pretension, to all intents and purposes whatsoever, except as provided in the fourth section of the said contract, relating to alteration in the grade or line of location; and that the said contract and the said specification should be in all respects subject to the provisions of 31 V. c. 13. That the works embraced in the contracts should be fully and entirely completed in every particular and given up under final certificates and to the satisfaction of the commissioners and engineer on the 1st of July, 1871, (time being declared to be material and of the essence of the contract) and in default of such completion contractors should forfeit all right, claim, etc., to any money due or percentage agreed to be retained, and to pay as liquidated damages \$2,000 for each and every week for the time the work might remain uncompleted. That the commissioners upon giving seven clear days' notice if the works were not progressing so as to ensure their completion within the time stipulated or in accordance with the contract, had power to take the works out of the hands of the contractors and complete the works at their expense; in such case the contractors were to forfeit all right to money due on the works and to the percentage returned.

On 24th May, 1873, the contractors sent to the commissioners of the Intercolonial a statement of claims showing that

there was due to them a large sum of money for extra work, and that until a satisfactory arrangement be arrived at they would be unable to proceed and complete the works.

Thereupon notices were served upon them and the contracts were taken out of their hands, and completed at the cost of the contractors by the Government.

In 1876, the contractors by petition of right, claimed \$523,000 for money *bonâ fide* paid, laid out, and expended in and about the building and construction of said sections three and six, under the circumstances detailed in their petition.

The Crown denied the allegations of the petition, and pleaded that the suppliants were not entitled to any payment, except on the certificate of the engineer, and that the suppliants had been paid all that they obtained the engineer's certificate for, and in addition filed a counter-claim for a sum of \$159,982.57, as being due to the crown under the terms of the contract, for moneys expended by the commissioners over and above the bulk sums of the contract in completing said sections.

The case was tried in the Exchequer Court by Taschereau, J., and he held that under the terms of the contract the only sums for which the suppliants might be entitled to relief were, 1st, \$585,000 for interest upon and for the forbearance of divers large sums of money due and payable to them, and 2nd, \$27,022.58, the value of plant and materials left with the Government, but, that these sums were forfeited under the terms of the three clauses of the contract, and that no claim could be entered for extra work without the certificate of the engineer, and that the crown were entitled to the sum of \$159,953.51, as being the amount expended.

An appeal to the Supreme Court of Canada having been taken by the suppliant, it was

*Held*, affirming the judgment of the Court below, Fournier and Henry, JJ., dissenting, 1st, that by their contract the suppliants had waived all claim for payment of extra work. 2nd, that the contractors not having previously obtained from or been entitled to a certificate from the Chief Engineer, as provided by 31 V. c. 13, s. 18, for or on account of the moneys which they claimed, the petition of the suppliants was properly dismissed. 3rd. Under the terms of the contract, the work not having been completed within the time stipulated, or in accordance with the contract, the commis-

sioners had the power to take the contract out of the hands of the contractors and charge them with the extra cost for completing the same, but that in making up that amount the Court below should have deducted the amount awarded as being the value of the plant and materials taken over from the contracts by the Commissioners in June, 1873.

*Irvine, Q.C. and Girouard, Q.C., for the appellants.*

*Burbidge, Q.C., and A. Ferguson, for the respondent.*

QUEBEC.]

### JONES v. FRASER.

*Will, construction of—Legacy—Alienation of property bequeathed by testator, effect of—Partage—Estoppel.*

W. F. by his will bearing date 11th February, 1833, *inter alia* bequeathed to his illegitimate daughters, M. E. and M. a defined portion of the seigniories of Temiscouata and Madawaska, and the balance of said seigniories to his sons W. and E. A short time after making his will, the testator, who was heavily in debt, received an unexpected offer of £15,000 for the said seigniories, and he therefore sold at once, paid his most pressing debts, amounting to £5,400, and the balance of £9,600 was invested by loaning it on security of real estate.

At his death his estate appearing to be vacant as regards the £9,600, a curator was appointed.

On the 27th September, 1839, the parties entitled under the will proceeded to divide and apportion their legacies, basing their calculations upon the approximate area of the seigniories bequeathed, and received and collected part of the sums allotted to each by the *partage*.

In an action brought by the respondent against the curator in order to make him render an account, the Court ordered him to render an account, which he did, and deposited \$50,000 and other securities. On a report of distribution being made, F. (the respondent) filed an opposition claiming his share under the will. This opposition was contested by J., the appellant, on the grounds: 1st that the legacies were



revoked, and that in his capacity of universal legatee to his mother, (the legitimate child, he alleged, of the testator and the Indian woman who was *commune en biens* with the testator) he was entitled to one half of the proceeds of the said £9,600; and 2nd, that in the event of his claim as to legitimacy and revocation of the legacy being rejected, as by the will the daughters were exempt from the payment of the debts, he should, as representing one of the daughters, be entitled to her proportion of £15,000, the net proceeds of the sale.

*Held*, affirming the judgment of the Court below, that the sale of the seigniories which were the subject of the legacy in question in this cause, had not, considering the circumstances under which it was made, the effect of defeating that legacy. 2. That J. (the appellant), not having at the death of his mother repudiated the *partage* to which she was a party, but on the contrary having ratified it and acted under it, was estopped from claiming any thing more than what was allotted to his mother.

The judgment of the Court below held that as the testator declared that his daughters should not be liable for the payment of his debts, partition, as regards them, should be made of the sum of £15,000, the price obtained from the sale of the seigniories bequeathed, and not of the £9,600 remaining in his succession at his death.

On cross-appeal to the Supreme Court of Canada,

*Held*, that on the pleadings before the Court no adjudication could be made as to the sum of £5,400 paid by the curator for the debts, and that in the distribution of the moneys in Court, all that J. (the appellant) could claim to be collocated for, was the unpaid balance (if any) of his mother's share in the moneys, securities, interest, and profit of the said sum of £9,600, in accordance with the *partage* of the 27th September, 1839.

*Irvine, Q.C.*, and *Casgrain*, for the appellant.

*Pouliot*, for the respondent.

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## ONTARIO.

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High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 23RD DECEMBER, 1886.]

GORDON v. PHILLIPS.

*Discovery—Rule 285—Discretion of Judge—Information for purpose of pleading.*

The plaintiff had a good cause of action against the defendant, but was unable to frame his statement of claim without first examining the defendant and another.

*Held*, that he was entitled to such discovery under Rule 285, and that a Local Judge had exercised a proper discretion in granting it.

*Osler, Q.C.*, for the plaintiff.

*A. H. Marsh*, for the defendant.

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McMICHAEL v. GRAND TRUNK R. W. CO.

*Railway Company—Farm crossing—Gate fastening—Negligence—47 V. c. 11, s. 91 (D.)*

Plaintiff's horses, in consequence of defective fastening of gates at a farm crossing where defendants' railway crossed his farm, got through and on to the railway track and were killed by a passing train.

*Held*, that plaintiff by the continued use of the defective fastenings could not be deemed to have adopted them as sufficient, and that it was defendants' duty to provide and maintain proper fastenings for the gate.

47 V. c. 11, s. 9 (D.), commented on as to the nature of the duty cast on plaintiff to keep the gates closed; and *quære*, whether the words in the Act, that the owners must keep the gates closed, extend further than in respect of their own use of them; or whether, if the gates became opened by any accidental means, or by the act of a stranger, and remained

open without any person being near to prevent animals passing through it, the owner or occupier would be liable to the full extent provided by the Act, although it had become open without his agency or neglect, and remained so without his knowledge.

*McMichael, Q.C.*, for the plaintiff.

*Osler, Q.C.*, for the defendants.

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### RIVER STAVE COMPANY v. SILL.

*Fraudulent preference—Chattel mortgage—Insolvency of mortgagor—48 V. c. 26 (O.)—Antecedent debt—Antecedent promise to give security—49 V. c. 25 (O.)—Conflict of laws.*

A company, incorporated in the State of Michigan, had, while in insolvent circumstances, given a mortgage upon chattels in Ontario to defendant, a Michigan creditor, to secure previous cash advances made to the company under verbal promises by two directors that security would be given. The effect of the mortgage was to delay and prejudice other creditors and give defendant a preference over them.

*Held*, that under 48 V. c. 26 (O.), without regard at all to any question of *bona fides*, pressure, or knowledge of the company's financial position by its officers, or by defendant, the effect alone of the transaction avoided it.

*Held*, also, that this mortgage was not given in pursuance of any antecedent contract or promise of the company, but even if it were that it could not be upheld, because it was not shown to have been given in consideration of a money advance made in the *bona fide* belief that such advance would enable the debtors to continue business, and pay their debts in full.

*Held*, also, that, the property mortgaged being in Ontario, the transaction was governed by the laws of Ontario without regard to the laws of Michigan.

*Douglas, Q.C.*, for the motion.

*Aylesworth, contra.*

## MASTERS v. THRELKELD.

*Covenant—Proviso for acceleration of time for payment.*

Where there was a covenant that one-half of the surplus proceeds of goods, transferred by a debtor to his surety after deduction of liabilities, should be paid to the debtor by the surety by his promissory note at two years, with a proviso, that should the defendant or the firm of T. & Son, of which the defendant was a member, dispose of their business, or make an assignment for the benefit of creditors, the note should become due, and S. then retired from the business and transferred to the defendant all his interest therein ;

*Held* that the time of payment of the note was not by that means accelerated.

*T. B. Browning*, for the motion.

*G. Bell*, contra.

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HISLOP v. THE TOWNSHIP OF MCGILLIVRAY.

*Municipal corporation—Highway—Mandamus—Pleading—Evidence—New Trial—Judgment—Rule 321.*

In an action against a township charging, (1st) the stopping up of a highway, thereby preventing access to plaintiff's farm ; (2nd) the obstructing of a highway, thereby, etc. ; (3rd) the not maintaining and repairing a highway, thereby, etc.

*Held*, per Wilson, C. J., that as the part of the highway complained of was part of an original allowance for road which had never been opened or made, the statement of claim did not properly describe the subject of complaint, and the plaintiff must therefore fail.

2. That an action claiming a mandamus will lie against a municipality for not opening an original allowance for road, by reason of which the occupant of land cannot have access to and from his land, to and from a public road, if there be no other convenient way to and from his land, and if there be no good reason, in respect of means or otherwise, why such allowance should not be opened, and if the work required to be done for that purpose be worth the outlay required to open and maintain the same.

3. That although the municipality must be allowed a very large discretionary power to do or not to do such a work, it has not the sole and uncontrolled right to avoid doing it.

4. That if the claim made had been proved as stated, a new trial would have been granted, for the facts found by the jury were not warranted by the evidence.

*Semble*, if the evidence given will not warrant the Court in granting a mandamus upon motion to the Court, and the Court has before it all the materials necessary for finally determining the question in dispute, judgment may be given for the defendants under Rule 321 of the Judicature Act.

Per Armour, J. The action would not lie, the matter in question being strictly in the discretion of the municipal council; the verdict was not sustained by the evidence, and if necessary a new trial should be granted.

Per O'Connor, J. The action was sustainable in law, and the verdict was supported by the evidence.

*W. R. Meredith, Q.C.*, for the motion.

*McCarthy, Q.C.*, and *R. M. Meredith*, contra.

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## JOHNSON v. SHORTREED.

*Sale of Goods—Agreement, construction of—Covenant—Grant—Condition.*

By deed, dated 4th April, 1884, made between J. and S. and L., J. agreed to sell, and S. & L. to purchase all the merchantable pine, suitable for the purposes, standing, lying, and being on certain described property, for a sum which was then named and paid, "Provided, however, that the said timber and logs shall be cut and removed off said lot on or before the 4th of April, 1884."

The defendant B. (claiming through S. & L.) after the expiration of the time agreed upon, removed logs which J. had cut after said 4th day of July, 1884, and for this J. brought this action and recovered a verdict for \$125.

B. moved against the verdict, on the ground that under the deed, and the assignment to him, he was the absolute owner of the timber, subject merely to such claim as the vendor might have against the vendees for breach of the covenant to remove the pine within the time named.

*Held*, O'Connor, J., dissenting, that the agreement could not be construed as an absolute grant of the pine trees suitable for the business of the grantees, subject to a *covenant* by them to cut and remove the trees within 10 years; but that it was a grant of the pine subject to the *condition* that the timber and logs should be cut and removed off the property on or before the 4th day of April, 1884.

*Held*, also, that this condition applied as well to trees severed before as to those severed after the expiration of the term.

*Held*, per O'Connor, J., that the case was within the meaning of the law as decided by the Court in *McGregor v. McNeil*, 32 C. P. 538, and that the defendant was the absolute owner of the timber, with an affirmative license to cut and remove the same, which the vendor could not revoke, although the time within which the timber was to be removed had expired, though the vendor might have other remedies.

*Pepler*, for the motion.

*Strathy*, Q.C., contra.

## MITCHELL v. CITY OF LONDON INS. CO.

*Insurance—Marine—Fraudulent sale of tug—Proof of loss—Parties—Statutory conditions.*

G. insured a tug when navigating the Rivers Sydenham, St. Clair, Detroit, and Thames, and Lake St. Clair, loss, if any, payable to M. as his interest might appear at the time the insurance was effected. The tug was libelled in the American Admiralty Court, and to avoid the claim therein he used the proceedings of the Maritime Court, upon a claim for wages, to make a fraudulent sale of the tug to J. Afterwards G. procured a renewal of the policy without disclosing the sale. He then assigned the policy to M., who sent it to the defendants for their consent thereto, but before it was given the tug was burnt in the *Chenail Ecarté*. At the time of the fire, crude petroleum and earth oil were kept on the tug for lubricating purposes. M. and J. delivered proof papers of claim, but G. did not deliver any. At the trial leave was given to add G. and J. as co-plaintiffs, and judgment was directed to be entered for the full amount of the insurance.

*Held*, (1) That the leave given to add G. and J. as co-plaintiffs was proper, but that the judgment must be reduced to the amount of M.'s claim. (2) That the tug was at the time of the fire at one of the localities permitted by the policy. (3) That the rock and earth oils being kept for lubricating purposes, clause f. of the 10th statutory condition did not apply. (4) That there was a sufficient compliance in the case with the 12th and 13th statutory conditions.

Per Wilson, C. J. There was not sufficient proof of loss furnished, and defendants were not liable by reason of the crude and earth oils being kept in the tug.

Per O'Connor, J. A tug is not a building within the meaning of clause f. of the 10th statutory condition.

*W. R. Meredith, Q.C.*, for the motion.

*Robinson, Q.C.*, and *C. Millar*, contra.

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[WILSON, C. J., 13TH DECEMBER, 1886.]

## BELL TELEPHONE COMPANY v. BELLEVILLE ELECTRIC LIGHT COMPANY.

*License from municipal corporation—Telephone and Electric Light Companies—Interference by second licensee with rights of first—R. S. O. c. 157, ss. 59, 70; 45 V. c. 19, s. 3, (O.)*

An interlocutory injunction was granted to restrain defendants, who were carrying on business in partnership as an Electric Light Company under license from a municipal corporation, from running their lines in such a way as to interfere with the safe and efficient working of the business of the plaintiffs, an incorporated Telephone Company, also licensees of the corporation, under authority granted two years previously to the defendants' license.

*Held*, that, although the circumstance that the plaintiffs were in possession of the ground, and had their poles erected about two years before the defendants put up their poles, did not give them the exclusive possession or right to use the sides of the road on which they had placed their poles; yet, their possession being earlier than that of the defendants, the defendants had not the right to do any act interfering with or to the injury of the plaintiffs' rights.

*Held*, also, that independently of the provisions of R. S. O. c. 157, ss. 59 and 70, as extended to Electric Light Companies by 45 V. c. 19, s. 3 (O), the plaintiffs were entitled to relief on the general ground upon which protection and relief in cases of this kind are granted.

*Quare*, whether defendants were liable to indictment.

*S. G. Wood*, for the plaintiffs.

*Dickson, Q.C.*, for the defendants.

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## COMMON PLEAS DIVISION.

[ARMOUR, J., 10th JANUARY, 1887.]

### REGINA v. HEATH.

*Canada Temperance Act, ss. 99, 100—Conviction of buyer for aiding and abetting sale of liquor—32 & 33 V. c. 31, s. 15.*

S. 15 of 32 & 33 V. c. 31, does not apply to an offence against s. 99 of the Canada Temperance Act, 1878, so as to warrant the conviction of a buyer of liquor for aiding and abetting a sale contrary to the Act

An application to quash a conviction for that William Heath, "did aid, abet, counsel, and procure James Beaty in selling to him, the said William Heath, spirituous and intoxicating liquors at the township of Sombra, in the county of Lambton, in violating the second part of the Canada Temperance Act, 1878, then and there being in force," etc.

The evidence shewed that the complainant, James Beaty, was prosecuted for selling liquor in the county of Lambton, and William Heath testified to his selling liquor to him, and thereupon Beaty laid an information against Heath for aiding, etc., and swore that he sold liquor to Heath at his request, and upon this evidence Heath was convicted.

*Delamere* and *T. C. Milligan*, supported the application.

*J. S. Fraser* shewed cause.

ARMOUR, J., (after referring to the Canada Temperance Act, 1878, ss. 99 and 100, and to 32 and 33 V. c. 31.) I do not think that s. 15 of 32 & 33 V. c. 31, applies to an offence against the Canada Temperance Act, 1878;

(1) Because s. 107 of the Canada Temperance Act of 1878, while providing that every offence against the second part of



the Act may be prosecuted in the manner directed by the Act 32 & 33 V.c. 31, so far as no provision is hereby made for any matter or thing which may be required to be done with respect to such prosecution, and all the proceedings contained in the said Act shall be applicable to such prosecutions, and to the judicial or other officers before whom the same are hereby authorized to be brought, in the same manner as if they were incorporated in this list, and as if all such judicial and other officers were named in the said list, does not provide that s. 15 shall be applicable thereto or incorporated therein.

(2) Because s. 99 in terms prohibits only the exposing, or keeping for sale, selling, bartering, or giving, and does not expressly prohibit the buying or receiving by way of barter or gift, and s. 100 imposes a penalty only on the person exposing, or keeping for sale, selling, bartering, or giving, and imposes no penalty upon the person buying, or receiving by way of barter or gift.

(3) And because by s. 100, special provision is made against aiders and abettors by providing that whoever in the employment, or on the premises of another so exposes, or keeps for sale, or sells, or barters, or gives, in violation of the said second part of this Act, shall be held equally guilty with the principal, and shall be liable on summary conviction to the same penalty or punishment, and a person offending against this provision is an aider and abettor, and would probably, in the absence of any such provision be punishable as such under s. 15: *Wilson v. Stewart*, 3 B. & S. 913.

A clear distinction is drawn in ss. 96 and 100 between the exposing, or keeping for sale, selling, bartering, or giving, and the buying or receiving by way of barter or gift; the former is expressly prohibited, the latter is not expressly prohibited, and a penalty is imposed upon the person exposing, or keeping for sale, selling, bartering, or giving, and no penalty is imposed upon the person buying or receiving by way of barter or gift.

In s. 100 aiders and abettors in the offence created by s. 99, are defined and described, and are made punishable in the same manner as the principals, and the provision impliedly excludes aiders and abettors otherwise offending than as is therein defined and described.

It would be contrary to the manifest intention of the Legislature, if a buyer upon whom no penalty has been imposed, could be made liable to punishment as an aider and abettor of the seller.

But a buyer cannot in respect of a sale made to him by a seller, be regarded in point of law as an aider, abettor, counsellor, procurer, or principal in the second degree, for he is not such, but an actual perpetrator, a principal in the first degree.

In every sale there must be a seller and a buyer, the assent of each is equally required, and each participates in the sale in an equal degree; neither of them is in the sense of the law an aider, abettor, counsellor, or procurer, but each is an actual perpetrator; neither is a principal in the second degree, as aiders, abettors, counsellors, and procurers are, but each is a principal in the first degree. In a sense each procures the other to make the sale, but not in the sense of the law; neither is a procurer in the sense of the law.

If two men go out to fight by mutual agreement and do fight, each is guilty of an assault, and although in a sense each procures the commission of the assault, yet neither does so in the sense of the law; each is a principal in the first degree, an actual perpetrator, and not a principal in the second degree, an aider, abettor, counsellor, or procurer. See *Regina v. Coney*, 8 Q. B. D. 534.

Mr. Lash kindly referred me to American authorities upon similar questions tried under licensing and prohibitory laws resembling in their provisions ss. 99 and 100 of the Canada Temperance Act of 1878, and s. 15 of 32 & 33 V. c. 31, the principal of which are *Commonwealth v. Willard*, 32 Pick. 476; *State v. Rand*, 51 N. H. 361; and *State v. Bonner*, 2 Head 135, and they and others are to be found in *Bishop's Criminal Law*, 6th Ed., 658, note 4. I also refer to *Seager v. White*, 51 L. T. N. S. 261.

In my opinion the defendant was guilty of no offence against the law, and the conviction must be quashed.

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## IN CHAMBERS.

[PROUDFOOT, J., 10TH JANUARY, 1887.]

## POWELL v. PECK.

*Leave to appeal—Importance of case—Conflicting decisions.*

A motion by the plaintiff for leave to appeal to the Court of Appeal from the judgment of Proudfoot, J., 6 C. L. T. 530, as to the rate of interest to be allowed after maturity of a mortgage. The application was rendered necessary by the plaintiff having failed to give notice of appeal in due time. The plaintiff filed an affidavit excusing his delay.

*E. T. English*, for the plaintiff.

*Beck*, for the defendant.

PROUDFOOT, J., said that he did not deem the excuse sufficient, but was prepared to give leave to appeal for another reason: The decision was a most important one to mortgagees, many of whom would be heavy losers by having the rate of interest after maturity lessened, and many other cases were dependent upon it. The Chancellor had come to a different conclusion on the same question; see *London and Canadian L. and A. Co. v. Smythe*, ante p. 17; and took a different view of the case of *St. John v. Rykert*, 10 S. C. R. 278. Under these circumstances leave to appeal should be granted on payment of costs.

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*Re* ANDERSON TRUSTS.

*Summary application—Money in Court—Claim for damages—Action to be brought.*

Certain land was sold under the power of sale in a first mortgage, and the surplus proceeds of the sale were paid into Court by the first mortgagee. This surplus was claimed by the second mortgagee, and a claim was also made upon it by lessees of the mortgagor, under a lease subsequent to the mortgage, for damages for being deprived by the sale of their possession under the lease.

*R. Boulton*, for the lessees, moved on petition for an order referring it to a master to take an account of what was due to them and to the second mortgagee, and to report what should be paid to each out of the money in Court.

*J. Reeve*, for the second mortgagee, contra.

PROUDFOOT, J., dismissed the petition, holding that the claim of the lessees could not be adjudicated upon in a summary way, but that they should be left to bring an action, if so advised.

[13TH JANUARY, 1887.]

### TEMPERANCE COLONIZATION SOCIETY v. EVANS.

*Jury notice—Exclusive jurisdiction of equity—Judicature Act, s. 45—Action for declaration of right to specific performance—Equitable issues between defendants—Misrepresentations—Construction of agreement, Statute, and correspondence—Prejudicing the jury—C. L. P. Act, s. 255.*

The action was brought (1) for the recovery of instalments under a scrip contract, and (2) for a declaration of the plaintiffs' right to a specific performance of the part of the contract as to settlement duties. The time for the performance of the settlement duties had not arrived, but the defendants denied any right in the plaintiffs upon the contract at all, and the consequence of the non-performance, it was shown, would be, not only to prevent the plaintiffs from getting a rebate in price, but, under the terms of the contract with the Dominion government, might result in the forfeiture of the whole agreement.

*Held*, that the plaintiffs, if they established their case, would be entitled to a declaration of the liability of the defendants to perform the contract, and that the (2) cause of action was not one that could be answered in pecuniary damages, or upon which there would have been before the Judicature Act any adequate remedy at law, and a jury notice was therefore improper under s. 45, and should be struck out.

*Held*, also, that the circumstance that equitable issues were raised between the defendants was also a ground for striking out the jury notice.

One of the defences relied upon was the falsity of representations in the prospectus, and whether or not the represen-

tations were false depended in part upon the construction of the agreement between the plaintiffs and the Dominion Government, and of the Public Lands Act, 1879, and of the nature and effect of a correspondence between the plaintiffs and the Government.

*Held*, that the question whether there were any and what statements in the prospectus that amounted to a representation the falsity of which would afford a defence, and the determination of the fact of the falsity, were matters, if not exclusively for the Judge, at least more proper for the consideration of a Judge than a jury.

But even assuming that all the grounds of action would have been of common law cognizance, a Judge has power under s. 255 of the C. L. P. Act to direct the action to be tried without a jury, and it is a reason for such direction that by acts of persons other than the defendants, but of which the defendants may get the benefit, the plaintiffs may be prejudiced before a jury.

*A. H. Marsh*, for the plaintiffs.

*Hoyles*, for the defendants.

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[THE MASTER IN CHAMBERS, 11TH JANUARY, 1887.]

TEMPERANCE COLONIZATION SOCIETY v.  
EVANS.

*Foreign commission—Delaying trial—Laches.*

Motion by the defendants for an order for the issue of a foreign commission to the North West Territories, to take evidence on behalf of the defendants.

The application was made eleven months after issue joined, and on the second day of the Assizes at which the action was entered for trial, and it was admitted that the granting of the commission would necessitate the postponement of the trial.

*Hoyles*, for the defendants.

*A. H. Marsh*, for the plaintiffs.

The MASTER IN CHAMBERS refused the motion, holding that it was too late, and that the plaintiffs should not be delayed in bringing the action to trial.

## LOCKINGTON v. KING.

*Counter-Claim—Joinder of Issue—Close of pleadings—Judgment by default, setting aside.*

A motion by the plaintiff to set aside judgment signed by the defendant upon his counter-claim in default of a reply. The judgment was signed more than three weeks after the delivery of the counter-claim.

*Shepley*, for the motion.

*Sorley*, contra.

The MASTER IN CHAMBERS held that the case was covered by *Hare v. Cawthrope*, 11 P. R. 353; 6 C. L. T. 396; that three weeks having elapsed after delivery of the counter-claim, the pleadings were closed, and the counter-claim at issue. The judgment was therefore improperly signed, and must be set aside with costs to the plaintiff in any event.

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[12TH JANUARY, 1887.]

*In re* BUTCHER & HENDERSON.

*Affidavits, withdrawing from fyles—Muniments of title.*

This was a petition under the Vendor and Purchaser Act, which was withdrawn by consent.

*A. Mills*, for the Vendor, asked for an order to take off the fyles the affidavits fyled by the Vendor in support of the petition, with the object of delivering them to the purchaser to support his title.

The purchaser consented to the application.

The MASTER IN CHAMBERS said that there was a very stringent rule against affidavits being removed from the fyles, but he thought it ought to be relaxed in this case, as the affidavits were to be regarded as muniments of title.

*Order made as asked.*

## The County Court of the County of Brant.

(Reported by W. D. Jones, Esquire, Barrister-at-Law.)

### *In re* PEARSON.

*Assessment—Tax exemption—48 V. c. 42, s. 12—Parsonage—Superannuated minister.*

The dwelling of a superannuated Methodist minister not in charge of a congregation or circuit, is not a parsonage within the meaning of 43 V. c. 42, s. 12.

An appeal by the Reverend Thomas D. Pearson from the Court of Revision of the City of Brantford.

The appellant, a superannuated minister of the Methodist Church, was assessed for his dwelling \$4,000. In his appeal to the Court of Revision he claimed that it was exempt to the extent of \$2,000, under the 12th section of "The Assessment Amendment Act, 1885," 48 V. c. 42, as a parsonage, or dwelling occupied as such. The Court of Revision disallowed his appeal, and from that decision he appealed to the County Judge.

The appellant in person.

*Wilkes*, contra.

JONES, Co. J. The 12th Section of "The Assessment Amendment Act, 1885," provides for the exemption from taxation of "The stipend or salary of any clergyman or minister of religion while in actual connection with any church, and doing duty as such clergyman or minister, to the extent of one thousand dollars, and the parsonage, when occupied as such, or unoccupied, and if there be no parsonage, the dwelling house occupied by him with the land thereto attached, to the extent of two acres, and not exceeding two thousand dollars in value. This sub-section shall not apply to a minister or clergyman whose ordinary business or calling at the time of the assessment is not clerical though he may do occasional clerical work or duty."

Mr. Pearson, as appears from his examination before me, is a superannuated minister of the Methodist Church. He has no business or calling other than the duties incident to his

office as such superannuated minister. As such he has not charge of any congregation or circuit, but is expected to do such occasional preaching and ministerial work as may be required of him from time to time.

Mr. Pearson does not receive any ministerial "stipend or salary" from any congregation, but is paid a small allowance annually from the superannuated ministers' fund of the Methodist church, the amount so received being in proportion to the number of years he had been in the active work of the ministry of the church before superannuation.

The house for which the exemption is claimed is owned and occupied by himself. It is not provided for him by the church, or by any congregation. In his evidence he says that it is not a parsonage, but that there is a parsonage provided for the minister of the congregation in Brantford where he, Mr. Pearson, worships, and which is occupied by that minister, and allowed the exemption as a parsonage, as provided under the Act.

I think that the word "parsonage" in the section referred to, means a house or dwelling used as the residence of a minister in charge of a circuit or congregation. I do not think the appellant's house is such a parsonage. If it were, then it might happen that though there were but one minister in charge of a circuit or congregation, there might be half a dozen parsonages, if there were that many superannuated ministers residing on that circuit.

I think also that the first part of the section shows that the class of men entitled to this exemption are those only that are in the ordinary service of the church as ministers in charge of congregations. The words "stipend or salary" mean in their ordinary acception, an annual payment as wages for services annually performed. Mr. Pearson is in receipt of no such stipend or salary.

I regret that in coming to this decision I have had to differ from the judgment given by His Honour Judge McDougall, as reported in the *Canada Law Journal* for 1886, page 158. But see judgment of McDonald, County Judge, as reported in same volume, page 341, with which I agree. I concur in the opinion expressed by Judge McDougall, that the Legislature should so amend this sec-



tion as to make its proper construction free from doubt, and more especially so now, as there are conflicting decisions as to its proper interpretation.

I affirm the Court of Revision and dismiss the appeal.

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## NOVA SCOTIA.

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In the Supreme Court.

REGINA v. LAUTZ.

*Assault—Constable serving civil process—Peace officer in the due execution of his duty—32 & 33 V. c. 20, s. 39.*

Defendant was convicted under the Dominion Act of 1869, c. 20, s. 39, of an assault upon a "constable while in the due execution of his duty." The constable at the time the assault was committed was engaged in the service of civil process.

*Held*, McDonald, C.J., and McDonald, J., dissenting, that the constable though serving civil process came within the meaning of the words "peace officer" in the Act, and that defendant was properly convicted.

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## GRINDLAY v. BLAKIE.

*Registration—Priority—Possession—Notice—R. S. Nova Scotia (4th series), c. 79, s. 22.*

By chapter 79 of the Revised Statutes (4th series), s. 22, a judgment duly recovered and docketed shall bind the lands of the party against whom the judgment shall have passed, from and after the registry thereof in the county or district where the lands are, as effectually as a mortgage, whether such lands shall have been acquired before or after the registering of such judgment; and deeds or mortgages of such lands, duly executed, but not registered, shall be void

against the judgment creditor who shall first register his judgment.

The Bank of British North America recovered a judgment against one Merriam and others, 21st January, 1876, and registered the judgment on the following day.

On the 23rd April, 1873, Merriam conveyed certain lands to one Fraser, under whom defendant claimed, who went into possession and improved the lands, and was in possession at the time of the recovery and the registry of the judgment, but neglected to record his deed until 28th January, 1876, some days after the registry of the judgment. On 5th May, 1879, after execution had been duly issued, the property was sold at sheriff's sale to the plaintiff, the general manager of the Bank of British North America, who brought ejectment. Neither the plaintiff nor the Bank of which he was manager had actual notice of the conveyance to Fraser, or of the fact of possession until just previously to the sale.

*Held*, by McDonald, J., McDonald, C. J., and Smith, J., concurring, that the prior unrecorded deed to Fraser was avoided by the registry of the judgment, and that plaintiff was entitled to recover.

Weatherbe, J., dissented.

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### MCDONALD v. MCDONALD.

*Judgment by default—Setting aside—Affidavit accounting for previous non-appearance.*

A judgment by default was entered against defendant in an action to set aside as fraudulent a deed made by McD., one of the defendants, to his co-defendant, O'B. The latter obtained an order allowing him to come in and defend, after judgment, on an affidavit accounting for his failure to appear previously, and alleging that the purchase was made *bona fide* and without fraudulent intent. Plaintiff having appealed from the order so granted;

*Held*, that the appeal must be dismissed, as defendant was only required to account for his non-appearance.

## McDONALD v. RONAN.

*Notice of appeal from County Court how headed—Certiorari to remove proceedings from Magistrate's Court to County Court quashed for want of notice.*

A notice of motion for appeal from the County Court must be headed in that Court.

A writ of *cetriorari* to remove a prosecution for selling liquor contrary to the provisions of the Provincial License Act from the Magistrates' Court into the County Court, was quashed by a Judge of the latter Court, on the grounds (1st) that the parties applying for the writ did not give the Justices the six days' notice of their intention, required by 13 Geo. III. c. 2, s. 18 ; and (2nd) that they did not swear that they did not sell liquor contrary to law.

An appeal from the decision of the County Court Judge was dismissed with costs.

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COX v. CROCKER.

*Continuances to procure evidence—Discretion of County Court Judge to grant.*

An application to a Judge of the County Court for a continuance, in order to enable plaintiff to procure the evidence of a witness, was refused on the ground that a continuance had been previously granted for the same purpose, the Judge being of opinion that he had no power to order a second continuance.

*Held*, that the Judge had a discretion which he should have exercised.

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BARCLAY v. DUSTAN.

*Ex parte order for extension of time for appeal set aside—Further time allowed on giving security.*

An order allowing plaintiff an extension of time for appeal having been granted *ex parte*, where the plaintiff was out of the jurisdiction and the defendant might have applied for further security for costs, the order was quashed.

But plaintiff, not having received notice of the decision from the prothonotary in time to enable him to appeal, was allowed time for that purpose on giving security.

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## REGINA v. WOLFE.

*Canada Temperance Act—No appeal from County Court to Supreme Court.*

No appeal lies to the Supreme Court from the County Court in cases arising under the provisions of the Canada Temperance Act of 1878, and no such appeal can be taken under the Local Act providing generally for appeals from the County Court.

*McDonald v. McCuish*, followed.

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## NEW BRUNSWICK.

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### In the Supreme Court.

#### ELLIOTT v. FLANAGAN.

*Assessment for taxes—How made where owner of land dead—Assessment against widow—Warrant to sell land for non-payment of taxes—Effect of including bad assessments in warrant—Whether warrant to sell land a judicial act—Estoppel by attending sheriff's sale of land without protesting.*

G., being the owner of real estate, conveyed it by registered deed in 1868, to three persons in trust for the benefit of his creditors, but remained in possession. In 1873, the trustees executed a deed conveying the property to G., but it was not acknowledged by them, or registered till after his death, nor was there any proof of actual delivery of it to him. G. died in 1875, leaving a widow and children in possession of the land. Under the Act 38 V. c. 40, incorporating the town of Moncton, the property was assessed in the years 1875, 1876, and 1877, to "the estate of G." and in 1878 to "the widow G." These taxes being unpaid, a warrant issued in 1879 by

the chairman of the town of Moncton, to the sheriff of the county, under the Act 41, V. c. 82, reciting that the estate of G. had been assessed for the years 1875, 1876, 1877, and 1878, in a certain sum (the aggregate of the four years), which remained unpaid, and directing the sheriff to sell so much of the real estate as would be sufficient to pay the assessments and expenses. Under this warrant, the sheriff seized and sold part of the land on which the assessments had been made, and it was purchased by the defendant—no objection having been made by the heirs, though a person attended the sale at their request, for the purpose of bidding in the land. In ejectment by the heirs of G. against the purchaser:

*Held*, per Allen, C.J., Wetmore, King, and Fraser, JJ., Palmer, J. dissenting: 1. That the assessment for 1875, while G. was living, was improperly made against his "estate;" and that the assessment for 1878 against "the widow G." did not indicate that it was upon her as the occupier or person having the ostensible control of her deceased husband's real estate; but was merely in her character as widow; and therefore that non-payment by her was not a default by the heirs of G.

2. That the inclusion of the assessments for 1875 and 1878 in the warrant for the sale of the real estate, vitiated the whole, and that no title passed by the sheriff's deed to the defendant.

Per Allen, C.J., and Palmer, J., Wetmore, King, and Fraser, JJ., dissenting: 1. That the order of the chairman of the town in issuing the warrant for the sale was a judicial act, and while it stood unreversed, the validity of the sale could not be disputed.

2. That the heirs of G. having attended the sheriff's sale by their agent for the purpose of bidding on the property, and having seen the defendant purchase it, without protest or objection, were estopped from disputing the defendant's title.

Per Fraser, J. *Quære*—Whether where an assessment is against the estate of a deceased person, a sale of the real estate can be made for non-payment of the taxes, under 41 V. c. 82.

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## SHIRREFF v. MUIRHEAD.

*Sheriff—Seizure of property under execution—Promise by attorney of judgment creditor to indemnify—Adoption by client of attorney's acts—Evidence—Replevin—Several claimants of property replevied—Delivery by sheriff to one claimant—Agreement to indemnify sheriff—Action on agreement.*

A promise by the attorney of a judgment creditor to indemnify a sheriff for seizing goods under an execution issued on the judgment is binding upon his client, where the attorney has the management of the business, and the subsequent acts of the client shew that he had adopted the proceedings which the attorney had taken in reference to the execution.

An exemplification of a judgment in an action brought by the judgment debtor against the sheriff for seizing the goods, is evidence in an action by the sheriff against the judgment creditor on the promise to indemnify.

A sheriff having taken logs under a writ of replevin issued by A. against B., claims of property were put in by H., M., and S. respectively, but no writ *de proprietate probanda* was issued. Part of the logs having got into the possession of M., he after requested the sheriff to deliver the remainder of them to him. The sheriff objected to doing so—S., who claimed the logs, having brought an action against him for detaining them—but, on M. stating to him that he would be kept harmless if he delivered up the logs to him, the sheriff delivered the logs to M., who sawed them in his mill. S. recovered in his action against the sheriff, for a part of the logs delivered to M., at whose expense the suit was defended.

*Held*, that the sheriff was entitled to recover against M., on his promise to indemnify, the amount of the judgment recovered by S. against the sheriff.

## PITFIELD v. KIMBALL.

*Assumpsit—Plea of "never indebted"—Whether applicable to County Courts—Appeal after merits tried on improper plea—Accord and satisfaction—Challenge of juror—how made—Effect of juror liable to be challenged serving on jury.*

In an action of assumpsit in a County Court defendant pleaded "never indebted." The case was tried without objection to the plea, and a verdict given for the plaintiff.

*Held*, on appeal, that whether such a plea is applicable to suits in the County Courts or not, the judgment ought not to be reversed after the case had been tried on the merits. .

Where the plaintiff's demand is for a liquidated amount, the payment of a smaller sum will not amount to a satisfaction of the larger sum, even though the plaintiff agreed to accept it in full.

The fact of a jurymen who is open to challenge having served on the jury is not *per se* a ground for a new trial.

A party challenging a juror should make his objection in such a manner that the Judge or the Clerk of the Court can hear him ; and unless he does so, he cannot raise the objection after the juror is sworn.

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### *Ex parte* HOWARD & CRANGLE.

*Canada Temperance Act—Keeping liquor for sale—Partners—Joint conviction.*

A conviction of A. and B., who were in partnership, for an offence several in its nature (keeping intoxicating liquor for sale), adjudging that they, for their said offence, should forfeit and pay \$50, and in default of payment, be imprisoned for forty days, is bad. The penalty ought to be imposed on the parties severally.

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## MANITOBA.

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### In the Queen's Bench.

[THE FULL COURT.]

### ROBINSON v. CUSTON.

*Assignment for benefit of creditors—Business to be carried on—Reservation of property exempt from execution.*

An assignment for the benefit of creditors contained the following clause: " Provided always that the said trustee

shall have power and authority, if he shall deem it expedient, and for the general benefit of the creditors, from time to time, and as often as he shall deem it proper, out of the proceeds of the sales of the said stock, to purchase goods and stock for the purpose of enabling him to assort and sell off the present stock to the best advantage, for the benefit of the creditors ; but such purchase shall be made with such view only, and not with a view of continuing the business beyond a reasonable time . . . . . Provided, also, that the said party of the first part, notwithstanding anything herein contained, shall have the right and privilege, if he so elects within a reasonable time, to reserve to himself out of the goods and chattels and property hereinbefore conveyed and assigned, such property as would be exempt from seizure under execution according to the laws of the Province of Manitoba."

*Held*, that the assignment was not, by reason of these clauses, void as against creditors.

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## ONTARIO.

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### High Court of Justice.

#### QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 23RD DECEMBER, 1886.]

#### FROST v. HINES.

*Action to recover land—First and second mortgagee—Lease by mortgagor after mortgage—Mortgagee in possession.*

C., owner of the premises in question, mortgaged them on 6th February, 1880, to the C. P. L. & S. Co. On 17th March, 1883, C. made a second mortgage to L., who assigned to plaintiff. On 5th October, 1883, C. leased the premises



to defendant for ten years from 1st April, 1884, at \$175 for the first year, and \$165 for subsequent years, payable in advance on 27th October in each year. The lease contained a clause that rent should be paid to H., or sent to the mortgagees as payments of interest on loan made by the lessor. H. was the local agent of the first mortgagees. The clause referred to was inserted in the lease at the defendant's request. The rent payable on 27th October, 1883, 1884, and 1885, was paid by defendant to H., who remitted the money to the company. H. gave defendant receipts for the rent as agent for C. The company sent H. receipts for the money forwarded by him, expressing that the money was received on account of advances made to C. H. had no authority to receive money for the company. The company were not made aware of the existence of the lease, or of its provisions.

The plaintiff brought this action to recover possession of the mortgaged premises, his mortgage being in default. The defendant set up the lease and the clause referred to, the payment of rent to the company, and that he was tenant to the company, whose mortgage was in default.

*Held*, that plaintiff as second mortgagee was entitled to recover, unless it could be established that defendant was in possession as tenant of the first mortgagees, and not as tenant of the mortgagor.

*Held*, also, that, as the company received the money sent them by H. not as rent of the mortgaged lands, but on account of advances made to C., they could not under the evidence be held to be mortgagees in possession, and that defendant was not their tenant.

*Held*, also, that even if the company had been aware of the provision in the lease and had received the money with such knowledge, they would not have been mortgagees in possession with defendant as their tenant, as the money under the very terms of the provision would not have been received as rent, but "as payments of interest on a loan made by the lessor."

*Lash*, Q.C., for the motion.

*Hoyles*, contra.

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## CHANCERY DIVISION.

[THE DIVISIONAL COURT, 8TH JANUARY, 1887.]

## MEYER v. BELL.

*Seduction—Right of mother and stepfather to maintain action when daughter not living with plaintiffs.*

In an action for seduction, brought by the mother and stepfather of the woman seduced, it appeared that at the time of the seduction she was not living at home with the plaintiffs, but was out at service.

*Held*, affirming the decision of Galt, J., that the plaintiffs had the right to maintain the action.

*German*, for the plaintiffs.

*Osler, Q.C.*, for the defendant.

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COYNE v. BRODDY.

*Trustee and cestui que trust—Principal and agent—Statute of Limitations.*

J. C. died in 1876, and left an estate very much embarrassed to his wife, the plaintiff. B., an active business man, acted as agent for the plaintiff in settling up the estate, and induced a very large majority of the creditors to give up their claims or settle them on terms very favourable to the plaintiff. He also sold a house, part of the estate, for her, and part of the purchase money was taken in the notes of F., the purchaser. The notes came to the hands of S., a brother of the plaintiff, who held them and collected some of them for her.

Some little time afterwards B. asked S. if the notes were all paid, and when he was told some of them were not, he said the money for a loan to F. was then going through his hands, and if he had the notes he could collect them, and so save them for the widow and orphans out of that money. The notes were given to him and he collected them; but the money was left in his hands unclaimed for eight years, until he made an assignment for the benefit of creditors.

In an action against him and his assignees, in which the

defendants set up the Statute of Limitations as a bar, and the plaintiff contended that B. was a trustee, and that the statute could not be pleaded.

*Held*, per CAMERON, C. J., at the trial, that B. received the notes as agent of the plaintiff, for the purpose of collecting the money, and that the statute was a bar. There was no express trust; only such a trust as arose from the relation of principal and agent, which does not prevent the operation of the statute.

On appeal, as the Divisional Court was evenly divided, this judgment was affirmed.

Per BOYD, C. B. undertook to hold the notes, not for safe custody as a deposit, nor for investment as a scrivener, but as an attorney or agent to collect and remit. This establishes a fiduciary relationship, but not that of trustee and *cestui que trust* to all intents. A breach of trust arose on B's part when he failed to remit, and kept the money an unreasonable time, which indicated his intention to convert it to his own use. From the time plaintiff knew or might have known that, they were at arm's length and the retention was an adverse possession. Plaintiff's duty then was to make him pay as a debtor, and if she failed to resort to the usual remedy within six years, he had the right to plead the statute. Substantially B's position was not different from that of a solicitor who receives notes and securities to collect for his client; the moneys he collects are recoverable by a legal action, to which if not prosecuted within six years the statute is a bar. *Cook v. Grant*, 32 C. P. 511, distinguished.

Per PROUDFOOT, J. A trust attached upon the notes given to B.; they were not to become his property; a special confidence was reposed in him to secure their payment out of an entirely distinct transaction and *to save them for the widow and orphans*. The trust continued until the completion of the transaction by the money being placed in the widow's hands. The notes were not due when confided to B. He was not a mere agent to collect, but he was to use an influence to get better security or anticipated payment.

*Cook v. Grant*, supra, considered.

*Bain*, Q.C., for the plaintiff.

*J. H. Macdonald*, Q.C., for the defendant.

## ST. DENIS v. BAXTER.

*Findings of jury in answer to questions—Recommendation of verdict—Entry of verdict by Judge on findings.*

In an action for wrongful dismissal, the jury found (1) That there was a final bargain made between the parties ; (2) That the plaintiff was to get \$900 a year ; and in answer to the question, " It being a condition of the bargain that the plaintiff's term of service should end if he were not fit to do the duties of a captain, was the plaintiff fit to do the duties of a captain ? " Ans. (3) It has not been satisfactorily shown by the evidence ; and (4) The plaintiff was dismissed. They added as a rider the following: " Your jury believing that the plaintiff did not receive proper aid in the discharge of his duty, would recommend a verdict for plaintiff of \$100." The Judge entered judgment for the defendant and the plaintiff moved to set it aside.

The Divisional Court being equally divided, the verdict was not disturbed, but leave to appeal was granted.

Per BOYD, C. The onus was on the defendants to prove the unfitness, and the jury, as is manifest by their recommendation, did not intend to pronounce against the plaintiff's competence. The findings were left in too uncertain a state to enter a verdict for either party against the will of the other. No material part of what the jury returns to the Judge should be disregarded.

Per PROUDFOOT, J. The duty of the jury was completed when they answered the question. It was for the Judge to determine what the legal result of the answers was. The jury's recommendation would seem to have been made more for sympathy for the plaintiff than with the desire of affirming his competency, which they had previously found was not proved.

*Aylesworth*, for the plaintiff.

*W. Cassels*, Q.C., for the defendants.

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 RUDD v. BELL.

*Master and servant—Accident—Negligence—Fellow-servant.*

The plaintiff having had years of experience in running iron work and machines, and having been previously employed

by the defendants in their wood working manufactory, hired a second time and was injured in working a jointer, which he was told other men had been injured at. In an action against his employers,

*Held*, that, as the plaintiff knew from his own inspection and experience that the machine was dangerous, that it needed caution and firmness in operating, as the risks were open to his observation, and as his opportunities and means of judging of the danger were at least as good as those of his employers, a nonsuit was properly entered at the trial.

Negligence on the part of a manager or foreman is not constructive negligence on the part of the master. Actual personal negligence of the master must be established, as a foreman is but a fellow-servant, though it may be of a higher grade.

*J. L. Murphy*, for the plaintiff.

*A. H. MacDonald*, for the defendant.

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### McMULLEN v. FREE.

*Damages to present crop—Permanent damage to farm.—Evidence, improper rejection of—Mortgagor and Mortgagee—Parties.*

Plaintiff bought seed barley from defendants, guaranteed to be clean. The seed was sown, and it was afterwards discovered that it was mixed with a weed called wild vetches or wild peas, which took root and grew up with the barley.

In an action to recover damages for depreciation in the value of the farm, the evidence showed that the plaintiff had not sustained any damage to his crop, but he tendered evidence to show depreciation in the value of the farm, which the learned Judge refused to receive. On motion to the Divisional Court for a new trial,

*Held*, reversing the decision of Galt, J., that the plaintiff should have been allowed to substantiate, if he could, that the necessary consequence of sowing the foul seed would be to lower appreciably the value of the farm.

On the argument it was contended that, as the farm was mortgaged, the plaintiff (mortgagor) could not maintain the action.

*Held*, that in equity the mortgagor is the owner in a case like this, where the land is worth considerably more than the mortgage, and it is for the Judge at the trial to direct the mortgagee to be added, or to direct the sum recovered to be paid into Court for his protection, if it appears that his interests are being affected prejudicially by the litigation, but it is no reason for dismissing the action ; and a new trial was ordered.

*Riddell*, for the plaintiff.

*Clute*, for the defendant.

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[BOYD, C., 24TH NOVEMBER, 1886.]

### BEATY v. SHAW.

*Mortgage by executor to co-executor—Death of mortgagee—Discharge by survivor, validity of—Improvements under mistake of title.*

The Rev. W. H. died, leaving F. H. & W. H. his executors, who both proved the will. F. H., on 17th January, 1874, mortgaged certain lands to W. H., his co-executor, to secure certain moneys due by F. H. to the estate of the Rev. W. H., both mortgagor and mortgagee being described as executors of that estate. Interest was paid on that mortgage up to 1st April, 1885. The executor W. H. died intestate in July, 1879. On 10th April, 1884, F. H. sold the lands to M., and on the same day executed a discharge of his own mortgage, which was registered 15th April, 1884, in which the mortgage was misdescribed as if it had been taken to the Rev. W. H.

In an action by the plaintiff, who had been appointed by a order of Court to represent the estate of the Rev. W. H., on the mortgage against several defendants, who had become owners of the land, in which the defendants contended that the discharge of F. H. was valid, and claimed for their improvements under mistake of title,

*Held*, that the mortgage was not discharged, nor the estate re-conveyed to F. H. by what was done, and that the legal effect of the mortgage was to enable W. H. to hold the estate in his own right as against F. H.; although as regards the beneficiaries under the Rev. W. H.'s will, W. H.

was only a trustee. R. S. O. c. 111, s. 67, contemplates the action of two parties, one to pay and the other to receive, and not both represented by one, and that one whose duty and interest were in direct conflict; and under these circumstances such a transaction cannot stand.

The defendants had actual notice by the registered discharge, that F. H., as surviving executor of the Rev. W. H., was attempting to deal with himself as mortgagee, and it was at their peril they took such a title without satisfying themselves that there was a real satisfaction and discharge of the mortgage moneys as regards the persons entitled under the Rev. W. H.'s will. But a reference was ordered as to improvements under mistake of title.

*Bacon v. Shier*, 16 Gr. 485, considered and distinguished.

*J. C. Hamilton* and *Allan Cassels*, for the plaintiff.

*Bain*, Q.C., for the defendants.

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[PROUDFOOT, J., 23RD OCTOBER, 1886.]

*In re* CANNON; OATES v. CANNON.

*Administration order—Champerty—"Prowling assignee"—Creditors' rights.*

O., assuming that the firm of T. and O., of which he was a member, had a small claim of about \$300 against the estate of A. M. C., a deceased intestate, ascertained that H. & Co. had a large one of over \$7,000 on promissory notes, and tried to induce H. & Co. to join him in an action for the administration of A. M. C.'s estate, which they declined to do. H. & Co. offered to sell their claim to him for \$2,000, which offer O. refused to accept, but finally, without the payment of any valuable consideration, obtained an assignment of H. & Co.'s claim, for the purpose of collecting it under an agreement by which he was to pay H. & Co. one half of the amount collected on said claim, after payment of costs. H. & Co. did not make themselves responsible for any costs. O. brought his action on these notes against M. E. C., the administratrix of A. M. C., who, not knowing anything of the claim, did not resist the making of the administration order; but when the facts were elicited in the Master's office, and when O.'s own claim was disallowed by the Master, filed a

petition to have the order set aside on the ground of champerty.

*Held*, that as a decree for administration is for the benefit of all the creditors and as another creditor had established a claim under it, the administration order could not be set aside.

*Held*, also, that the agreement between O. and H. & Co. was champertous, or so strongly savouring of it, that it could not be maintained, and that O. could not prove on the notes in this administration suit.

*Reynelle v. Sprye*, 1 D. M. & G. 671, and *Hutley v. Hutley*, L. R. 8 Q. B. 112, considered.

*McMichael*, Q.C., and *A. Hoskin*, Q.C., for the petitioner.  
*Foster*, Q.C., and *J. B. Clarke*, contra.

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[FERGUSON, J., 19TH JANUARY, 1887.]

### CLARKSON v. THE ONTARIO BANK.

*Constitutional Law—48 V. c. 26 (O.)—Intra vires—Not retrospective.*

The Act respecting assignments for the benefit of creditors, 48 V. c. 26, (O.) is *intra vires* of the Ontario Legislature.

*Broddy v. Stuart*, ante p. 6, followed.

The Act is not retrospective in its operation.

The plaintiff was the assignee by virtue of an assignment made on the 22nd day of September, 1885, under 48 V. c. 26, of the estate and effects of Wm. Kyle & Co., wholesale merchants.

The action was brought to have it declared that certain payments, made by the firm of William Kyle & Co. to the defendants, were void under the provisions of the Act, as against the plaintiff and the creditors of the firm, and for payment of the same to the plaintiff with interest and costs. S. 2, and s. 3, s.-s. 3, of the Act, are set out in the case of *Broddy v. Stuart*, ante p. 6, and it was under these sections that the action was brought.

The defendants demurred to the statement of claim on the grounds (1) That the Act in question is *ultra vires* of the Ontario Legislature, and (2) That certain of the payments in question were not affected by the Act, as they were alleged



by the statement of claim to have been made before the Act came into force, and the Act is not retrospective.

*Moss, Q.C.*, for the defendants.

*J. H. Macdonald, Q.C.*, for the plaintiff.

FERGUSON, J., (1) followed *Broddy v. Stuart*, ante, p. 6. and held that the Act is *intra vires* of the Ontario Legislature; and held (2) that the Act is not retrospective in its operation, and that payments made before it came into force are not affected by it. He also stayed proceedings in the action to allow the defendants to appeal upon the Constitutional question, with liberty however to the plaintiff to apply at any time as to the preservation of evidence.

NOTE.—In holding that the Act in question was retrospective, the learned Judge followed an unreported decision of the Court of Appeal, upon appeal from the County Court of Wentworth, in *Coates v. Kelly*.

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## COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 18TH NOVEMBER, 1886.]

### *Re* VOTERS' LIST OF ST. THOMAS.

*Prohibition—County Judge—Voters' List—Time for lodging complaints.*

The voters' lists for the city of St. Thomas were posted up in the office of the city clerk on the 23rd October, 1886. On the 19th November, 1886, three days before the time for voters to give notice of any complaint against the list had expired, the clerk made a report to the County Judge in the form No. 7 in the schedule to the Voters' Lists Act, R. S. O. c. 9, and the Judge thereupon on the same day made an order appointing the 30th November, 1886, for the holding a Court to hear complaints of errors and omissions in the voters' list, and notice of the time and place for holding the Court was duly published in a St. Thomas newspaper. Previous to the 19th of November, numerous notices of complaints as to errors and omissions in the list had been given to the clerk.

An application for a writ of prohibition to the County Judge, to restrain him from holding such Court on the 19th of November, on the ground that he had no jurisdiction to make an order for holding it, until the time for voters to give notice of complaints had expired, was refused with costs.

*Colin McDougall, Q.C.*, for the application.

*Ermatinger, Q.C.*, contra.

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[24TH DECEMBER, 1886.]

### HOWELL v. LISTOWEL RINK CO.

*Distress—Sale—Illegality—Notice—Appraisement—More goods sold than necessary—Tender—Landlord purchasing at sale—Abandonment—Misdirection.*

In an action for illegal distress and sale of goods distrained, no notice of legal appraisement before sale was proved. It was shewn that the actual value of the goods sold was greater than the amount due for rent, that the goods were sold for less than their value, and that the plaintiff had made a tender to the bailiff before sale. The damages found for the plaintiff were \$475.

*Held*, that the plaintiff was entitled to recover, and that the damages should be, not merely the difference between the rent and the value of the goods, but the whole damage sustained by him by being deprived of his goods, and that the evidence of an actual loss sustained by the plaintiff justified the finding.

It was urged that the plaintiff had abandoned the premises; but the evidence failed to substantiate this.

H., who was the president of the defendants, an incorporated company, and also a member of an incorporated Gas Company, purchased the goods at the sale for the Gas Company. The Judge at the trial directed the jury that H. was in reality both seller and buyer, and therefore the sale was void.

*Held*, that there was misdirection, but as it appeared that no substantial wrong or miscarriage was occasioned thereby, the Court would not interfere.

*Falconbridge, Q.C.*, for the plaintiff.

*Shepley*, for the defendants.

## LANGDON v. ROBERTSON.

*Carriage of goods—Contract—Principal and agent—Damages—Bill of lading—Foreign law—Public policy.*

In 1882, S., one of the plaintiffs, being then in Winnipeg, ordered goods of K. L. & Co., of Montreal, through L., also then at Winnipeg, and ordered them to be shipped to plaintiffs, at Flat Creek, Manitoba, via Milwaukee and the C. &c. Railway, by which line plaintiffs had an arrangement for a special rate of freight, of which they informed K. L. & Co., but did not notify them of the terms thereof. K. L. & Co. delivered the goods to C. & M. at Montreal as agents of the Western &c. boats, consigned to plaintiffs, to be sent as directed by plaintiffs. The bill of lading which C. & M. gave for the goods was prepared by a clerk of K. L. & Co., who stated that he attached thereto a ticket marked, "Ship our freight by C. &c. Railway. Great bonded fast line, low rates." The goods were carried by defendants' vessel, not to Milwaukee but to Duluth, and from there by railway to their destination, and were accepted by plaintiffs, who had to pay higher freight than if they had been carried as directed. The distance from Milwaukee to Flat Creek was longer than by Duluth, but by reason of the special agreement the freight was less. S. proved the terms of the contract, and that it was made with the general freight agent of the railway company.

*Held*, that a contract between the plaintiffs and defendants to carry via Milwaukee was proved, as it clearly appeared that C. & M. were defendants' agents to make the contract; and that plaintiffs were entitled to recover for the breach thereof in not carrying to Milwaukee; but that under the circumstances the plaintiffs could only recover nominal damages.

*Held*, also, following *Friendly v. Canada Transit Co.*, 11 O. R. 756, that the plaintiffs were owners of the goods and entitled to maintain the action.

*Held*, also, that the contract for the low rate could not be assumed to be illegal, or contrary to public policy, as being lower than the ordinary local rates, for even if it could not be enforced by plaintiffs against the company, that would not be a defence to the defendants.

*Held*, also, that the fact of the bill of lading having been made in the Province of Quebec, did not deprive plaintiffs of the benefit of R. S. O. c. 116, for not only was this not set up by the pleadings, but also it did not appear that the Quebec law was different from that of Ontario, and in the absence of proof it would be assumed to be the same.

*J. L. Murphy*, for the plaintiffs.

*Mackelcan, Q.C.*, for the defendants.

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### MERCHANTS' BANK v. LUCAS.

*Bill of exchange—Forgery—Estoppel.*

Y., who had been in a partnership with defendants L. and J. Y., under the name of the H. C. Co., withdrew from the firm and assumed the position of general manager, but had no power to sign drafts for purposes of his own. Y., among other bills, on the 25th June, 1883, drew a bill of exchange in the name of the defendants on M. & Co., a firm in Montreal, for \$2,760, which was discounted by the plaintiffs, and sent to Montreal, where it was duly accepted. The bill was to mature on the 28th September. About 25th August Y. called at the bank and got them to recall the bill, as he said they were settling with the M. & Co. The bill was received back by the bank on the 27th of August. On the 25th August Y. wrote to the defendants requesting them to retire and charge to his account, among others, the draft in question, stating that it was drawn in defendants' name, and discounted at plaintiffs' bank, but for his own accommodation, that the proceeds were applied for his own use, and that defendants should pay no part of it. On the 27th August, the defendant L. called at the bank and asked to see the draft, and when it was shown to him, examined it very critically, and when asked why he did so, he said, referring to J. Y.'s supposed signature, that it was not usually so shaky, and said he would call in a day or two to see if the bill had been taken up. A few days afterwards, J. Y. called at the bank and asked to see the bill, and examined it very carefully. The acting manager asked him if he would send a cheque for it, and he answered that it was too late that day, but he would do so next day.

No cheque was sent; and about the 13th September, the acting manager and the bank solicitor called to see J. Y., and asked him why he had not sent his cheque, when he replied he did not know, but admitted having promised to do so, and said that at that time he had thought he would send it.

In answer to inquiry he refused to say whether or not the signature was his. At the time the draft was returned to the bank and shewn to L., Y. had a large sum to his credit with the firm, and a considerable sum even after the commencement of this action.

*Held*, Rose, J., dissenting, that under the circumstances the defendants were estopped from denying their liability on the bill.

*Robinson, Q.C., and E. Martin, Q.C., for the plaintiffs.*

*McCarthy, Q.C., and Bruce, Q.C., for the defendants.*

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### LEGGATT v. CLARRY.

*Sale of goods—Acceptance—Payment by accepting bills of exchange—Latent defects—Damages—Counter-claim.*

Action on three bills of exchange drawn by plaintiff on, and accepted by, defendant for the price of certain boots and shoes bought by defendant from plaintiff. The goods were ordered by defendant through G., plaintiff's agent, who showed defendant samples of the goods, some of which were what is known in the trade as "solid leather," and others as "shoddy." The defendant stated he bought what was known as "solid leather," while G. stated he sold by sample, and that the goods delivered were in accordance with the sample. The order for the goods was given on the 5th September, 1885, and part of the goods sent to defendant in November, and the residue somewhat later. In January, 1886, the defendant went to Montreal and asked to get an extension of time, as he said, to see if the goods would turn out all right, which the plaintiff refused to give, and defendant said if they did not turn out all right, he would ship them back. A large quantity of the goods were sold. In February the defendant claimed to be entitled to return the goods, because, as he alleged, they did not answer the contract, the defect being a

latent one, and not discoverable by ordinary inspection and examination. There was no evidence to show what defendant's alleged loss was.

*Held*, that under the circumstances there was no defence to the action on the bills; but that the defendant's remedy, if any, for the plaintiff's alleged breach of contract in supplying goods ordered must rest on the counter-claim, but that there could be no judgment thereon, as there was not sufficient evidence of the loss sustained, and as the learned Judge at the trial entered judgment for the plaintiff without prejudice to the defendant bringing an action for damages, if so advised.

*Aylesworth*, for the plaintiff.

*McCarthy*, Q.C., and *S. M. Jarvis*, for the defendant.

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### COWAN v. LANDELL.

*Slander—Privilege—Malice—Father and child.*

The defendant's son, alleged to be an infant, was brought before a magistrate charged with assault. The defendant, the father, attended before the magistrate. The plaintiff was called as a witness on the prosecutor's behalf, when defendant objected to his evidence, saying, "He is a perjurer; he perjured himself three times at Betts' trial before you." There was no evidence to show that the defendant acted for or on behalf of his son with his son's consent, nor was it absolutely proved that the son was a minor.

*Held*, that the communication was not absolutely privileged, and a non-suit was therefore set aside and a new trial ordered, with costs to the plaintiff if he succeeded, but if not without costs, unless the parties would agree to the action being dismissed, with costs to be paid by the defendant.

*Allan Cassels*, for the plaintiff.

*Mosgrove*, for the defendant.

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### RAE v. McDONALD.

*Insolvency—Preference—R. S. O. c. 118—48 V. c. 26, s. 2, construction of—  
Dower—Misdirection.*

Under R. S. O. c. 118, as amended by 48 V. c. 26, s. 2, one of three things must occur before a conveyance, assignment,

etc., of any real property can be impeached, namely, the person making the disposition of his property by any of the modes indicated must (1) at the time be in insolvent circumstances, or (2) be unable to pay his debts in full, or (3) know that he is on the eve of insolvency; and in addition, the disposition must be made by the owner of the property with the intent to defeat, delay, or prejudice his creditors, or to give to any one or more of them a preference, or it must have that effect.

In an action by the plaintiff, a creditor, to set aside a mortgage made by the debtor to the defendant,

*Held* on the evidence, that the debtor was insolvent when he made the mortgage, and that the defendant obtained a preference thereby over the other creditors, and that the mortgage must be set aside.

Per ROSE, J. Evidence of the value of dower is properly admissible in determining the value of the debtor's liabilities.

The Judge at the trial charged the jury that there was a difference between the debtor, a farmer, and a trader on whom calls for payment may be made day by day; that a farmer was not expected to meet demands exactly in that way. The principal question was whether he owned property at that time which, with reasonable management, with proper care, and with reasonable time, would enable him, if he was pressed, to pay his debts in full, or not.

Per ROSE, J. There was misdirection in that he did not guard his direction by stating that there was no difference in principle, where the question to be determined was whether there were assets out of which the liabilities could be collected, if necessary, by levy and execution.

Two of the debts owing were to relatives, being for \$1,840 and \$800, secured by mortgage and promissory notes. The Judge charged that because the debts were under the control of the debtor, they must not be included in estimating the liabilities.

Per ROSE, J. This was misdirection also.

*Held*, following *Macdonald v. McCall*, 12 A. R. 593, that a creditor to maintain an action of this kind need not be a judgment creditor.

*Held*, also, that there is nothing to prevent a Judge directing the jury to find upon equitable issues.

Per CAMERON, C.J. In determining whether a debtor is insolvent, etc., his assets or effects are not to be estimated at what they might bring at a forced sale under execution, but at the fair value in cash on the market at any ordinary sale.

*Shepley*, for the plaintiff.

*Woods, Q.C.*, for the defendants.

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## STEVENSON v. TRAYNOR.

*Assessment and taxes—Onus of proof—Arrears of taxes.*

In ejectment the plaintiff claimed under a patent from the Crown, dated 15th June, 1878. The defendants claimed under a tax deed, dated 10th November, 1881, made under a sale on 21st October, 1880. The taxes for which the land was sold were \$1.13 for school rate in 1877, and \$1 for 1878. There was no evidence as to the rights of the plaintiff prior to the issuing of the patent, nor was it shown that the Commissioner of Crown Lands had made any return to the Treasurer of the land having been located as a free grant "sold or agreed to be sold" under R. S. O. c. 180, s. 106.

*Held*, that the production by the defendant of the tax deed did not cast the onus on the plaintiff, the patentee, of proving that no taxes were in arrear; but that the plaintiff by the production of his patent made out a *prima facie* case, and the defendant relying on his tax deed was bound to prove the tax sale, and that some portion of the taxes were in arrear for three years, which the evidence failed to show.

*Laidlaw, Q.C.*, for the plaintiff.

*J. B. Clarke*, for the defendant.

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## WELSH v. CITY OF ST. CATHARINES.

*Municipal Corporation—Public drain—Private drain connecting therewith—Liability of Corporation.*

To render a corporation liable for injury from the overflow of a drain, it must be shewn affirmatively that the corporation required the property owners to use the public drain by connecting their private drains therewith, that the drain has been improperly and negligently constructed, or that it has



become obstructed, and the corporation have negligently omitted to remove the obstruction within a reasonable time after knowledge or notice, and injury results therefrom; or that the corporation have brought more water to the plaintiff's land by means of the drain than would have otherwise have come there, and wilfully poured it thereon, or negligently allowed it to escape and flow on the land.

The plaintiff had a house on a street in the city of St. Catharines which was drained by a drain running through private grounds to and under a raceway, but this was stopped up by the persons owning the lands on the other side thereof, on which the water flowed. There was an open ditch or drain on the east side of the street connecting with the raceway.

The raceway, which was no higher than the street, was afterwards banked up, whereby the flow of the water was stopped and was spread over the adjoining lands. Whereupon R., the then owner of the plaintiff's house, and others, petitioned the council to construct a drain under the raceway, which was done by means of a well at the raceway and a five inch pipe under it. R. then connected his box drain with the well. The only evidence of acquiescence by the corporation, was the knowledge thereof by O., the defendants' street inspector, and no objection made by him. Afterwards the defendants connected the drainage of other streets with the well, whereby more water was brought down to the well than the five inch pipe would carry off, and it flowed back on the plaintiff's premises.

*Held*, following *McConkey v. Corporation of Brockville*, 11 O. R. 322, that the defendants were not liable for the damage sustained by the plaintiff.

*Lash, Q.C.*, and *R. Gregory Cox*, for the plaintiff.

*Moss, Q.C.*, and *R. Macdonald*, for the defendants.

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## REGINA v. McFEE.

*Criminal law—Forgery—Uttering promissory note.*

W., a Division Court bailiff, who had an execution against P. M. and H. M., arranged to accept a note to be made by A. M., payable to the order of A. D. F. The note was drawn

up by W., and handed to the prisoner to obtain the indorsement of A. D. F. The prisoner took it away, and shortly afterwards returned with the name A. D. F. indorsed upon it.

The prisoner then handed the note to A. M., who signed his name as maker, and A. M. then delivered the note to W., who subsequently negotiated it. The name A. D. F. was a forgery.

*Held*, that an indictment for forgery would not lie, for at the time when A. D. F.'s name was signed, the instrument was not a promissory note by reason of the maker's name not being then signed to it; and neither would a count for uttering lie, for after it was signed by A. M., it was never in the prisoner's possession.

*McMahon, Q.C.*, for the Crown.

*John Dickinson*, for the prisoner.

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## COCKBURN v. MUSKOKA LUMBER CO.

*Free grant lands—Locatee cutting timber for clearing—Timber license—Damages—Loss of property.*

Under R. S. O. c. 24, s. 10, as amended by 43 V. c. 4, s. 2, the locatee may cut and use such pine trees as may be necessary for the purpose of building and fencing on the land so located, and may also cut and dispose of all trees, including pine trees, required to be removed in the actual clearing of the land for cultivation, but no pine trees (except for the necessary building and fencing as aforesaid) shall be cut beyond the limit of said clearing.

*Held*, that there was nothing to prevent the cutting, clearing, and cultivating the land in several parcels in various shapes and forms, it not being necessary that the clearing should be together and contiguous, so long as such is done in good faith for clearing and cultivation, as was proved as a fact here; and that the locatee may cut such pine trees as may be necessary for the purpose of building and fencing whenever he chooses, but they only must be used for such purposes; and when the trees are cut in the actual process of clearing for the purpose of cultivation, they may be sold and disposed of.

Trees so cut by the locatee in the actual process of cultivation, etc., were sold to the plaintiff, a mill owner, but were seized by defendants, the timber licensees, who also had a mill, and were taken by them thereto and cut up into lumber. It was proved that the plaintiff could not get other logs at the season of the year in which these things happened.

*Held*, Cameron, C. J., dissenting, that the plaintiff was entitled to the loss of profits sustained by him by being deprived of cutting the lumber into logs at his mill.

*Pepler*, for the plaintiff.

*Robinson*, Q.C., and *J. H. Mayne Campbell*, for the defendants.

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## GRAHAM v. LONDON MUTUAL INSURANCE CO.

*Insurance—Fire—Mutual Company—Assent to further assurance.*

To an action on a fire insurance policy in a Mutual Company, the defendants set up as a defence the 8th statutory condition indorsed on the policy, whereby the Company were not to be liable for any loss "if any subsequent insurance be effected in any other Company, unless and until the Company assent by writing signed by a duly authorized agent." By 44 V. c. 20, s. 28 (O.) the Fire Insurance Policy Act was made applicable to Mutual Insurance Companies, except where the provisions of the Mutual Fire Insurance Companies' Act are inconsistent with or supplementary or in addition thereto. By the Mutual Companies' Act, R. S. O. c. 161, s. 29, it is provided that "if an insurance subsists by the Act or with the knowledge of the insured in any Company and in any other office at the same time, the insurance in the Company shall be void, unless the double insurance subsists with the assent of the directors, signified by indorsement on the policy, signed by the secretary or other officer authorized to do so, or otherwise acknowledged in writing"; and by s. 40 that "whenever notification in writing has been received by a Company from a person already insured of his having insured an additional sum on the same property in some other Company, the said additional insurance shall be deemed assented to, unless the Company so notified within two weeks after the receipt of such notice, signify to the parties in writing their dissent."

The policy in the defendants' Company was effected on the 31st July, 1884. On 4th January, 1886, the plaintiff effected a further insurance in the Ontario Mutual for \$1,000, of which no notice was given until the 8th March, 1886, when plaintiff wrote to the defendants: "I hereby notify you that I have put a second insurance on my stock and barn and implements." The defendants replied on the 18th March, informing the plaintiff that he had not given the number of the policy or the amount of the insurance, or the name of the Company. The plaintiff did not reply to this, because, as he said, he was away from home at the time. A fire took place on the 16th March and destroyed the insured property.

The jury found that the plaintiff did not within a reasonable time after effecting the further insurance notify the defendants, but that the notice was reasonably sufficient, so far as plaintiff knew.

*Held*, that under R. S. O. c. 161, s. 39, the insurance was void, and that it was immaterial whether the plaintiff had or had not notified the defendants within a reasonable time, when there was no assent, and that the plaintiff could not avail himself of s. 40, as there was no sufficient notice given.

*Held*, also, that under the 8th statutory condition the policy was void, and if s. 40 could be held to be supplementary, etc., of it, the plaintiff, by reason of his insufficient notice, did not come within it.

*J. MacLennan, Q.C.*, for the plaintiff.

*MacMillan*, for the defendants.

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## JAMES v. CLEMENT.

*Party wall—Evidence—Injunction—Damages.*

The plaintiff claimed that the foundation of the dividing or partition wall between his and the defendant's building was on his premises, and that the upper part thereof had always been used as a party wall; that the defendant without his consent raised the said wall a foot above plaintiff's premises, and altered the roof from a flat to a slanting roof, whereby water, etc., were thrown on plaintiff's premises, and plaintiff asked for a declaration that the wall was a party wall, and that defendant be restrained from preventing plaintiff from

using same, together with the new part or continuation thereof, on payment by plaintiff of half the cost thereof, and that the defendant be also restrained from permitting the water to be discharged on the plaintiff's premises.

The jury found that the plaintiff had sustained damage to the extent of \$35, and also that the wall was a party wall. Judgment was thereupon entered for the plaintiff for the relief asked.

*Held*, on motion to set aside the judgment, that there was no evidence to sustain the finding that the wall was a party wall, for the evidence shewed that it was wholly built on the defendant's land, and there was no agreement to shew that it was to be deemed a party wall.

The judgment was therefore set aside, but as the damages were not moved against, they were not interfered with.

*Hardy*, Q.C., for the plaintiff.

*Robertson*, Q.C., for the defendant.

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[WILSON, C.J., 3RD DECEMBER, 1886.]

PETERBOROUGH REAL ESTATE INVESTMENT  
CO. v. PATTERSON.

*Will, construction of—Estate by entreties—Estate tail—Mortgage.*

The testatrix by her will devised lot 15 to her son, A. P., and his wife, M. P., "and to their children and children's children for ever . . . Provided always that the afore-said A. P. and M. P. shall not be at liberty, at any time, or for any purpose, to convey or dispose of the said lands, as it is my will that the same be entailed for the benefit of their children." The testatrix then devised all the rest and residue of her estate to M. P., "to have and to hold the same to her and her heirs, executors, administrators, and assigns, to her and their use and behoof forever." After the death of the testatrix, M. P. mortgaged lot 15 to the plaintiffs, by a mortgage in fee simple.

*Held*, taking the whole will together, that A. P. and M. P. took an estate for life by entreties in lot 15, and their children an estate in fee tail in severalty.

*Held*, also, that the said will did not contain such a restriction on alienation as to render the mortgage void, but that it was a valid charge for the lives of the said M. P. and A. P. and for the life of the survivor of them.

*Poussette, Q.C.*, for the plaintiffs.

*J. K. Kerr Q.C.*, for the infant defendants.

*Clute and Wallace Nesbitt*, for the other defendants.

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[O'CONNOR, J., 18TH JANUARY, 1887.]

### CONGER v. GRAND TRUNK R. W. CO.

*Railway—Accident—Limitations of actions—Consolidated Railway Act, 1879  
s. 27 (D.)—R. S. O. c. 128, s. 5.*

On the 10th of May, 1879, C. was seated in a car of the C. V. R. Co. standing on the railway of that Co., when an engine of the defendants ran upon the railway of the C. V. R. Co., through gross negligence of the defendants, as alleged, and collided with the car in which C. was. He was injured in the collision, and died on the 11th of August, 1885, as alleged, from the injuries then received.

This action was brought by his executrix on the 4th of August, 1886, claiming damages by reason of the premises.

Upon demurrer to the defence, which set up the several statutes of limitations of actions in force in this Province:

*Held*, that the action was for injury sustained "by reason of the railway," and that s. 27 of the Consolidated Railway Act of Canada, 1879, applied; and that the limitation in that section prevailed over the limitation in R. S. O. c. 128, s. 5; and therefore the action was barred, as it was brought more than six months, though less than twelve months, after the death of the deceased person.

This was an action by the executrix of the late P. D. Conger, under R. S. O. c. 128, for damages sustained by reason of the alleged negligence of the defendants, resulting in a railway collision, in which the deceased suffered injuries, alleged to have been the cause of his death.

The collision occurred on the 10th of May, 1879. Mr. Conger died on the 11th of August, 1885, and this action was begun on the 4th of August, 1886.

The statement of claim set out: (Para. 3) That on the day of the collision Mr. Conger was a passenger in a car of the Credit Valley Railway Company, upon the Credit Valley Railway, which was connected with the Grand Trunk Railway at a point near Carleton station on the Grand Trunk, in the County of York, and Province of Ontario, by means of a switch, by the opening of which locomotive engines and cars

might pass from the Grand Trunk Railway to the Credit Valley Railway, and in the opposite way. (Para. 4). That the switch belonged to the defendants and was part of their line and was under the management and care of a switchman in their employment, whose duty it was to open the switch when necessary for the passage of locomotives and cars from the Grand Trunk Railway to the Credit Valley Railway and in the opposite way, when he received proper orders and instructions, and when the switch might be opened safely, and to keep it closed at other times, so as to prevent the passing of locomotives and cars from one railway to the other. (Para. 5). That on the day of the collision, immediately before it happened, the passenger car in which Mr. Conger was seated, was standing on the Credit Valley Railway, a short distance from the switch, and a locomotive engine of the defendants, in charge of and driven by an engine-driver in their employment, in the usual course of his employment, was proceeding at an unusually high and improper rate of speed in a westerly direction along the Grand Trunk Railway, approaching the switch from the east on its way from Toronto to Carleton station, when the switchman who was at that time in charge of the switch opened it on the approach of the engine so as to allow and cause the engine to pass from the Grand Trunk Railway to and upon the Credit Valley Railway, whereby and by reason of the high and improper rate of speed at which the engine was then being driven, it passed, before it could be stopped, upon and along the Credit Valley Railway, and was driven against and violently collided with the car in which Mr. Conger was. (Para. 6). The switchman was guilty of gross negligence, as the engine was not required or intended to go upon the Credit Valley Railway, and he had no instructions to open the switch, and it was extremely dangerous to do so, as he knew or ought to have known. (Para. 7). The engine-driver was also guilty of gross negligence in driving the engine at so high a rate of speed, and his negligence contributed to cause the collision. (Para. 8). The defendants were also guilty of gross negligence in not providing proper signals, etc. (Para. 10). By the collision the car in which Mr. Conger then lawfully was a passenger, was forced from off the rails of the Credit Valley Railway and broken, and Mr. Conger was thrown with great violence upon

his seat, and was crushed beneath heavy portions of the car, whereby several of his ribs were broken and he was otherwise wounded and bruised, and sustained serious and permanent internal injuries from which he never recovered. (Para. 11). That Mr. Conger died on the 11th of August, 1885 by reason of the injuries sustained from the collision.

The statement of defence was as follows:

1. The defendants say they are not guilty as in the plaintiff's statement of claim alleged, by Statutes, C. S. C. c. 66, s. 83, also 42 V. c. 9, s. 27, both Public Acts.

2. The defendants further say that the alleged accident happened more than six years before the death of P. D. Conger, and at the time of his death all cause of action to him, because thereof, if any such existed at any time, which the defendants do not admit, was barred by the provisions of the several statutes relating to the limitations of actions, which were then and now are in force in this Province, and the defendants submit that such being the case, the alleged causes of action are therefore also barred to the plaintiff, and further that this action was not brought within the time limited to the plaintiff by the said statutes, that is, within six months next after the death of the said P. D. Conger.

The plaintiff demurred to the second paragraph of the defence upon the following grounds:

1. That the statutory limitations of six years and six months respectively do not nor does either of them apply to this action, which is created by a special statute limiting the period of one year from the death of the deceased as the time within which the action may be brought.

2. That the cause of action did not accrue until the death of the deceased, and could not be barred by any statute of limitations in his lifetime.

*W. A. Reeve, Q.C., for the plaintiff.*

*Osler, Q.C., and W. M. Douglas, for the defendants.*

O'CONNOR, J. It was argued for the plaintiff that inasmuch as the accident happened, not on the Grand Trunk Railway proper, but on the Credit Valley Railway, it could not be said to have happened "by reason of the Railway," and therefore the defendants were not entitled to the protec-



tion of the six months' time allowed for the commencement of the action. But a reference to the statements contained in the third, fourth, and fifth paragraphs of the plaintiff's statement of claim completely refutes that argument. Bearing these statements in mind, I see no real distinction, with reference to the liability of the defendants and the reason of the liability, between the consequences resulting from the accident happening where it did, and the consequences of a like accident happening on the defendants' own railway. It follows then that the damage was done "by reason of the railway": *May v. Ontario & Quebec R. W. Co.*, 10 O. R. 70, where the cases are reviewed. Then should the action have been brought within six months after the damage done, or was the plaintiff entitled to bring action at any time within the twelve months allowed by the Accident Act, commonly called Lord Campbell's Act, notwithstanding the limitation clause in the Railway Act? There is a difference of expression between the two limitations; the 4th s. of the Accident Act, C. S. C. c. 78, the 5th s. of R. S. O. c. 128 is: "Every such action shall be commenced within twelve months after the death of the deceased person." The expression of the 84th section of the Railway Act, C. S. C. c. 66, and of the 27th s. of the Consolidated Railway Act, 1879, is: "All suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months next after the time of the supposed damage sustained, or if there be continuing damage, then within six months next after the doing or committing such damage ceases, and not afterwards." This language explicitly forbids the bringing of the action after the expiration of the six months, and so far limits the permission of the Accident Act. I think the limitation of the Railway Act must govern and prevail in this action: *Cairns v. The Water Works Commissioners of Ottawa*, 25 C. P. 551. As this action was brought more than six months (though within twelve months) after "the death of the deceased person," it is barred, and cannot be proceeded with; and it is therefore unnecessary to decide the other question raised as to the ordinary limitation of six years. The demurrer is overruled with costs.

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## IN CHAMBERS.

[BOYD, C., 25TH JANUARY, 1887.]

## MACDONALD v. McCALL.

*Costs as between solicitor and client—Creditor's action—Contribution—Payment out of fund—Appeals.*

This was a creditor's action to set aside a chattel mortgage as preferential. The judgment at the trial declared that the mortgage was fraudulent and void as against the plaintiff and such other creditors of the defendant Cox, "as may contribute to the expenses of the suit," and directed that the plaintiff should be paid his party and party costs by the defendant McCall, and his additional costs, as between solicitor and client, out of the fund recovered for the creditors, by setting aside the mortgage. The case was carried by the defendants to the Court of Appeal and the Supreme Court of Canada, and the judgment at the trial was finally affirmed in all respects, but the additional costs as between solicitor and client were not given by the Court of Appeal or the Supreme Court.

*Middleton*, for the plaintiff; moved for a direction to the taxing officer to tax to the plaintiff the costs incurred by him in the Court of Appeal and the Supreme Court of Canada, in addition to party and party costs.

*George Kerr*, for the defendant, *McCall*, contra.

BOYD, C. \* \* \* The plaintiff's expenses in saving the fund are not limited to party and party costs, but extend to those incurred as between solicitor and client to the end of the proceedings in the appeal to the Supreme Court. As said by the Vice-Chancellor in *Thompson v. Cooper*, 2 Coll. 91 (1845): "The principle is that when, in a creditor's suit, the fund is insufficient to pay the plaintiff his costs, those who have come in and received a benefit under the decree, must contribute to make good the loss which the plaintiff has borne on behalf of all creditors. The division of the costs must be in proportion to the amount proved and received." These expenses are in such a case as this to be measured by the proper expenditure for costs as between solicitor and client; *Barker v. Wardle*, 2 My. & K. 818. The plaintiff has

a right, therefore, to object to the other creditors coming in to share in the fund until they have contributed to these extra costs, but to avoid circuitry it will be better to have these taxed now and paid out of the fund, which will practically accomplish the same result: *Lechmere v. Brazier*, 1 Russ. 72; *Stanton v. Hatfield*, 1 Keen 358; *Sutton v. Daggett*, 3 Beav. 8; and *Goldsmith v. Russell*, 5 De G. M. & G. 547. The result of the cases and the reason of the rule on which I act is placed in a very clear light by Mr. Justice Kay in a recent case, *Re McRae*, 32 Ch. D. 613.

[The Chancellor proceeded to state that he did not rest his decision on *Re Hill*, 33 Ch. D. 266, and went on to consider and distinguish that case.]

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[FERGUSON, J., 17TH JANUARY, 1837.]

*In re S. INFANTS.*

*Habeas Corpus—Evidence—R. S. O. c. 70, s. 6—Foreign commission—Discovery.*

*Held*, that the provision in R. S. O. c. 70, s. 6, that the Court or Judge before whom any writ of *habeas corpus* is returnable, may proceed to examine into the truth of the facts set forth in such return, by *affidavit or by affirmation*, is permissive only, and that a Judge has power in such a case to direct that the evidence shall be taken *viva voce* before him.

And in this matter it was directed, as in *Re Murdoch*, 9 P. R. 132, that the evidence should be taken *viva voce*; and it was ordered besides that a foreign commission should issue to take evidence abroad and that the parties to the application should be at liberty to examine each other for discovery before the hearing.

J. MacLennan, Q.C., and H. J. Scott, Q.C., for the father of the infants.

S. H. Blake, Q.C., and H. Cassels, for the mother.

## SNOWDEN v. HUNTINGDON.

*Chambers Appeal—Time—Christmas Vacation—Extending time.*

The time of Christmas vacation is not to be excluded in reckoning the eight days within which an appeal from the Master in Chambers or local Judge or Master sitting in Chambers is to be brought on as required by Rule 427.

As such appeals are not heard in vacation, the time for appealing will be extended as a matter of course upon an *ex parte* application.

*Hoyles*, for the plaintiff.

*W. M. Douglas*, for the defendant.

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*Re* WEST—WEST v. FALKINER.

*Administration—Carriage of proceedings—G. O. Chy. 470—Costs.*

This was a summary application on behalf of John J. West, the residuary legatee, under the will of Jeremiah West, deceased, for an order for the administration of the real and personal estate of the deceased. It was made returnable before the local master at Belleville. After service of notice of this application upon Falkiner, the executor, and others interested under the will, Falkiner obtained *ex parte* from the Master in Chambers, without disclosing the fact that notice had been served upon him, an order for administration.

When this application came before the Master at Belleville, the executor had brought his order into that Master's office, and was proceeding with the reference. The Master at Belleville enlarged this application before a Judge, and it now came on to be heard.

*Hoyles*, for the applicant, asked for an order under G. O. Chy. 470, giving the applicant the carriage of the proceedings under the executor's orders. He referred to *Penny v. Francis*, 7 Jur. N. S. 248; *Re Swire*, 21 Ch. D. 647; *Perrin v. Perrin*, 3 Ch. Chamb. R. 452, and as to costs, *Daniell's* Ch. Pr. 6th Ed. 1951.

*W. M. Douglas*, for the executor.

*W. H. Blake*, for the other parties.

FERGUSON, J., made an order for the continuation of the administration proceedings under the order obtained by the executor, and gave John J. West the carriage of the proceedings thereunder, and he ordered the executor to pay to John J. West and the other parties appearing on the motion their costs of the day.

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*Re* CUMMINGS; O'GRADY v. CUMMINGS.

*Partition—Summary application—Dispute as to applicant's interest in the lands.*

This was a summary application for partition of certain lands in the County of York, made on behalf of the two daughters of Eliza Cummings, deceased. The husband of the deceased resisted the application, alleging that the lands in question were conveyed to himself and his late wife jointly, and that they took the same by entires, and that he had the right of survivorship, and therefore the daughters took no interest in the lands on the death of the mother.

The applicants alleged that the whole of the purchase money for the lands in question had been furnished by their mother.

*Carson*, for the applicants.

*Dewart*, contra.

FERGUSON, J., held that he could not upon such an application determine whether or not the applicants had an interest in the lands such as would entitle them to partition, and he directed that the application should stand enlarged for two months, and that the applicants should be at liberty to bring an action for declaration of their rights within that time.

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[24th JANUARY, 1887.]

*In re* ALISON *et al.*, SOLICITORS.

*Solicitor and client—Delivery of bill of costs—Offer by solicitor—Taxation.*

Where a solicitor has offered to take in full settlement less than the amount of a bill of costs as rendered, and has made the offer in a manner unequivocal and binding upon him, then and not otherwise he is to be allowed the benefit of the offer upon taxation, if the client reject it, and proceed to tax the bill.

*Re Freeman et al.*, 1 P. R. 102, and *Re Carthew* and *Re Paull*, 27 Ch. D. 485, considered and explained.

And where the offer to make a reduction in the bill was not upon the face of it, nor in any letter accompanying it, but was made verbally, and in the course of a conversation on the subject, after the delivery of the bill,

*Held*, that the offer was not of an unequivocal character, made so as to be binding upon the solicitor, but left him free, when it was not accepted, to claim all he could get upon a taxation, and he was therefore not entitled to the benefit of it.

*MacNee*, for the solicitors.

*Watson*, for the client.

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[THE MASTER IN CHAMBERS, 25th JANUARY, 1887.]

DOMINION S. & I. CO. v. KILROY.

*Interpleader issue—Who shall be plaintiff—Husband and Wife—Possession of Wife—Execution against husband.*

An order was made directing the trial of an interpleader issue between the plaintiffs, who had an execution against the goods of the defendant, and had under it seized the stock-in-trade of a certain business, and the wife of the defendant, who claimed that the stock-in-trade belonged to her alone.

It appeared from the affidavits filed, that the business was that of the wife, that it had always been conducted in her name, but that the goods had been seized in the apparent possession of the husband, who managed the business under a power of attorney from the wife.

Upon settling the interpleader order, a question arose as to who should be plaintiff in the issue.

*J. R. Roaf*, for the execution creditors, admitted that the rule was that when goods were seized in the possession of the claimants, the execution creditor should be plaintiff in the issue; but he contended that in this case the goods were in the actual possession of the execution debtor when seized, and therefore that the onus was upon the claimant to shew that they were in reality her goods.

*Aylesworth*, for the claimant, submitted that if this were not a case of actual possession by the wife, apart from the

husband, there could be no such case. The onus was certainly on the execution creditors, when they seized the plant of the business of a married woman under an execution against her husband.

THE MASTER IN CHAMBERS directed that the execution creditors should be plaintiffs in the issue.

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### County Court, York.

[JANUARY, 1887.]

#### HARRINGTON v. SAUNDERS.

*Mechanic's Lien Acts—Material man, lien of—Priority of owner's claim for damages against principal contractor.*

As to the claim of a material man under the Mechanic's Lien Acts where there has been a failure on the part of the principal contractor, and the completion of his contract has occasioned the owner an outlay beyond the balance of the original contract price, and at the same time the payments to the contractor, or for the work actually performed, have been ninety per cent. or under, of the value of such work, then the claim of any lien-holder, other than for wages, must be postponed until the owner's damage is satisfied, and if such damage absorbs all amounts due to the original contractor, the lien of such lien-holder will not attach.

This was an action upon a mechanic's lien, brought by a material man against a sub-contractor, who purchased the material from him, and also against the principal contractor and the owner of the land.

The facts, which were undisputed, were as follows:—The defendant Baillie contracted in writing to erect for the sum of \$2,183 a building for the defendant Hewlett; Baillie sub-let the masonry and brickwork to the defendant Saunders at the contract price of \$956. The defendant Saunders purchased and had delivered to him by the plaintiff bricks to the value of \$240, which went on to the building. Baillie, after performing a portion of the work, became embarrassed and made an assignment for the benefit of creditors.

Hewlett, the owner, under the terms of his contract with Baillie, advertised for tenders to complete the work and re-let the contract to his brother, who was the lowest tenderer.

The parties to the action for the purpose of this suit admitted the following figures to show the state of the account as regards all parties.

Value of work done under contract by Baillie and Saunders, \$770. Amount paid thereon, \$543. Increased cost to owner of completing the house beyond balance of original contract price with Baillie, \$360. This was a direct loss suffered by the owner by reason of his (Baillie's) default. Last bricks delivered 6th January, 1886; lien filed 1st January, and notice given Hewlett, the owner, on 1st February.

*Snelling*, for the plaintiff, contended upon the authority of *Re Cornish*, 6 O. R. 259, that the plaintiff was entitled to recover ten per cent. of the value of the work done, viz., \$77 (10 per cent. upon \$770), as the owner is bound to pay that amount, and that the fact of the owner being put to an extra outlay of \$360 beyond the contract price, could not affect the result.

*Neville*, for the defendants, contra.

MACDOUGALL, Co. J.—The facts in this case bring it within the class of case suggested by the Chancellor in his judgment in *Re Cornish* (p. 265), and as to which he declines to express an opinion. He says, "It is not necessary to consider what would be the result if the contractor making default had occasioned damage to the owner above the balance of the contract price, a state of facts which is hinted at in s. 4 of 45 V. c. 15, but left for some future plaintiff to ascertain by the assistance of the Courts."

In *Goddard v. Coulson*, 10 A. R. 1, a case very similar in its facts to this case, Mr. Justice Patterson holds that the effect of s. 11, as amended by the Act of 1878, is only "to charge in favour of the mechanics, etc., ten per cent. of the money which becomes payable by the owner to the principal contractor." And in the same case he holds that the mechanic cannot recover anything because "the contract price agreed upon never became the price to be paid, because the contractor failed to do what was necessary to earn it, or to earn more than he was in good faith actually paid, that amount being under 90 per cent."

The Act of 1882 did not apply to *Goddard v. Coulson*, the litigation having arisen before the passing of that Act, but it



does apply to the present case. Reading that statute as being a later expression of the legislative will, I am of opinion that s. 4 of 45 V. c. 15 (O.), favours the view that the Legislature regarded the ten per cent. lien as postponed to an owner's claim for damages for a failure on the part of the contractor to complete his contract, and that in that view they thought it necessary to provide expressly for the lien of wages; whether in the case of wages, even, they have successfully legislated an unfortunate owner out of ten per cent. of a contract price for which he never became indebted to the contractor, must be left to some future owner to have settled, but in the meantime, as to the claim of a material man (as he is styled in many cases), I am of opinion that in all cases where there has been a failure on the part of the principal contractor, and the completion of his contract has occasioned the owner an outlay beyond the balance of the original contract price, and at the same time the payments to the contractor or for the work actually performed have been ninety per cent. or under of the value of such work, then in every such case the claim of any lien-holder (other than the claims for wages, which I do not deal with), must be postponed until the owner's damage is satisfied, and if such damage absorbs all amounts due the original contractor, under his contract for the work performed by him, then such lien will not attach.

Plaintiff's action dismissed with costs, and lien ordered to be discharged.

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## NOVA SCOTIA.

### In the Supreme Court.

#### *In re* R. R. JOHNSTON.

*Indigent Debtors' Act—Motion for discharge—Fraud—Mistake in order—Habeas Corpus—Sheriff.*

Application was made to the Judge of the County Court for the discharge of an insolvent debtor under c. 118 of the Revised Statutes (5th series). The application was refused

on the ground that the debtor had been guilty of fraud in respect of delay of payment and the disposal of his property, and the learned Judge made an order directing that he be confined in jail for a period of six months. This order was made on Saturday, the 23rd January, 1886, but was inadvertently dated as of the 24th (Sunday). The mistake being discovered, the learned Judge, on Monday the 25th, made a further order confirming the first order and directing that the debtor be confined in jail for a period of six months from the 23rd of January for such fraud.

Application was, thereupon, made to the Court for the discharge of the debtor, under a writ of *habeas corpus*, on the ground that he was illegally detained, the imprisonment under the execution having determined when the orders were made by the County Court Judge in respect to the imprisonment for fraud, and such orders being bad.

*Held*, that the prisoner was not entitled to the relief sought, the execution under which he was imprisoned continuing in force until he was released by the creditor, or until the making of a valid order for his discharge under the Act, or for his further imprisonment for fraud.

*Held*, also, that the writ of *habeas corpus* should have been directed to the sheriff, and not to the jailor.

Weatherbe, J., dissented.

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### McMILLAN v. McLEOD.

#### *Municipal Incorporation Act—Corrupt Practices at Elections.*

During a municipal election meals and liquors were supplied to voters at a private house in the interest of one of the parties. An appeal from a judgment of a Judge of the County Court refusing to set aside the election was allowed with costs.

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### McRITCHIE v. MORRISON.

#### *Municipal election—Improper conduct of presiding officer—Inconsistent clauses of Act.*

At a municipal election, at which defendant was a candidate, the election was held at defendant's house; the autho-

rized representative of the other party was excluded ; the election was conducted by defendant's brother-in-law as presiding officer, and his son as clerk ; and parties claiming to be voters were excluded from the polling place. The election was set aside.

S. 18 of c. 1 of the Acts of 1881 makes the decisions of the Judge below, on questions of fact, final.

Section 69 gives appeals " from every order and decision of the Judge."

*Held*, that the latter section must prevail.

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## MANITOBA.

### In the Queen's Bench.

[THE FULL COURT, EQUITY SIDE.]

#### WRIGHT v. THE CITY OF WINNIPEG.

*Expropriation—Damages in lieu of specific performance—Presumption against holder of unproduced documents—Dedication.*

Defendants took proceedings to expropriate lands of the plaintiff. The Commissioner awarded to the plaintiff \$21,455, but the award was not confirmed by a judge, as required by the defendants' charter.

*Held*, overruling Dubuc, J., that the award could not be enforced.

After the award the defendants agreed to give to the plaintiff, in exchange for the same land, two other pieces of land and \$12,000. The plaintiff thereupon removed certain buildings, and the defendants used the land for a street ; and the defendants paid the \$12,000, but refused to convey the two parcels of land, alleging that they formed portions of streets.

*Held*, affirming Dubuc, J.: 1. That a bill might be filed to recover damages for the breach of the contract, the deed from the plaintiff to the defendants having erroneously acknowledged receipt of the purchase money.

2. That the damages might fairly be placed at the difference between the \$21,455, the amount of the award, and the \$12,000 already paid, without proof of the locality of the two parcels of land, or their value, the defendants having had in their custody the documents by which the locality could have been proved, and not having produced them, but alleged their loss.

Filing in the Registry Office a plan of property showing a street or lane does not, in the absence of user by the public, amount to a dedication.

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[KILLAM, J.]

### THE MANITOBA INVESTMENT ASSOCIATION v. ASHDOWN.

*Disclaimer in mortgage case—Costs.*

One of two defendants in a mortgage case, who was entitled to a one-half interest in the equity of redemption, filed a disclaimer as follows:—

“After the service of the bill of complaint herein upon me I offered to quit claim any right or interest that I had in the matter in question in these suits to the plaintiffs, and the plaintiffs refused to accept said offer; and I disclaim all right, title, and interest, legal and equitable, in any of the said lands and premises, and I claim to be hence dismissed with my costs of suit incurred subsequently to said offer.”

*Held*, upon a hearing upon bill and answer, that the disclaiming defendant was not entitled to costs.

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### CRAWFORD v. MORTON. CRAWFORD v. DUFFIELD.

*Sci. Fa. against shareholder—Exhausting remedies against company.*

*Sci. Fa.* will lie against a shareholder by a creditor of the company under 40 V. c. 43, s. 47 (D.). An objection to that form of proceeding is not open upon demurrer.

Persons who are shareholders when the *sci. fa.* proceedings are commenced, are liable, although the execution against the company may have been returned *nulla bona* before they acquired their shares.

Judgment was recovered in Manitoba against a corporation, incorporated under the Canada Joint Stock Companies' Act, 1877, having its head office in the Province of Quebec, and an execution was returned *nulla bona*.

*Held*, that *sci. fa.* might be brought against a shareholder in Manitoba, although the company had assets in Quebec; and although money sufficient to pay the plaintiff's claim had, with the assent of the plaintiff, been paid to a third person in Quebec, for the purpose of paying off the plaintiff, and that such third person was able and willing to pay the amount to the plaintiff; and although the company had lands in Manitoba sufficient to answer the plaintiff's claim.

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### MCINTOSH v. NICKEL.

*Replevin—Action on bond—Pleading.*

To an action upon a replevin bond for not proceeding with effect, a plea that the replevin action is still pending is sufficient.

And a replication to such a plea disclosing delay is bad, unless the delay itself has terminated the action.

The condition in a replevin bond to prosecute with effect, is separate and distinct from the condition to prosecute without delay.

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## BRITISH COLUMBIA

In the Supreme Court.

[FULL BENCH.]

SPROULE v. REGINAM.

*Criminal Law—Writ of Error—Polling Jury—Venue, change of—32 & 33 V. c. 29, s. 11—Completion of Record—Courts of Oyer and Terminer—Judicature Act, 1879, s. 14—Assize Court Act, 1885—Power of Lieutenant-Governor to issue Commissions—B. N. A. Act, 1867, s. 129—Summoning Jurors—Jurors' Act, 1883, intra vires of Local Legislature—B. N. A. Act, s. 92, s-s. 14, and s. 91, s-s. 27.*

The plaintiff in error was committed for trial on a charge of murder. The scene of the alleged homicide was in the bailiwick of the sheriff of Kootenay.

On the application of the Crown Victoria, (in the bailiwick of the sheriff for Vancouver Island) was fixed as the place of trial; the Chief Justice, before making the order, required from the Crown "an undertaking that the Crown would abide by such order as the Judge who might preside at the trial should think just to meet the equity of s. 11 of 32 & 33 V. c. 29."

The order so pronounced was not drawn up, but a document incorrectly stating the order, and omitting all mention of the terms imposed, was signed at the time and handed to the gaoler, and under this document the prisoner was detained in the gaol at Victoria until his trial.

The prisoner was tried and found guilty at the sittings of the Court of Oyer and Terminer and General Gaol Delivery held at Victoria under the Assize Court Act, 1885, and presided over by Gray, J., a Judge of the Supreme Court of British Columbia, and a Justice named in a commission of Oyer and Terminer and General Gaol Delivery issued by the Lieutenant-Governor.

In the body of the indictment there was no venue stated, and the marginal venue was simply "British Columbia, to wit."

The jurors were selected, not from the whole of the bailiwick of the sheriff for Vancouver Island, as defined by the Sheriffs' Amendment Act, 1878, but from that portion of the bailiwick created by the Jurors' Act, 1883, as Victoria District.

On the return to a writ of error, the prisoner alleged a diminution of the record, and applied for a writ of *certiorari*.

*Held*, (1), that where an order has been made orally and afterwards imperfectly drawn up, *i.e.*, without specifying the terms upon which it was made, and such terms appear in the Judge's note made at the time of the application, it is proper, in making up the record on a writ of error prayed, that a true and perfect order should be drawn up and placed on the record.

*Held*, (2), that the refusal of the Judge at the trial to allow the prisoner's counsel to poll the jury after verdict was not a matter that could be dealt with on a writ of error, and, therefore, should not appear in the record.

On the writ of error—

*Held*, (1), that assuming the Lieutenant-Governor's commission to be void, the Court was properly constituted without commission, under s. 14, Judicature Act, 1879, and the Assize Court Act, 1885.

*Held*, (2), following the *McLeans'* case, that the commission of Oyer and Terminer and General Gaol Delivery was sufficient, and that the Lieutenant-Governor had power to issue it under s. 129 B. N. A. Act, 1867.

*Held*, (3), that the commission was not exhausted by reason of the Justices therein named having held under it Courts of Oyer and Terminer in other districts of the Province.

*Held*, (4), that there was no objection to the summoning of jurors from a limited portion of the shrievalty, under the Jurors' Act, 1883, as that Act in effect created new districts for the purposes of the administration of justice in criminal cases.

*Held*, (5), that the prescribing of the qualifications of jurors and the manner of preparing the jury lists, by the Jurors' Act, 1883, were not matters of "criminal procedure," within the meaning of s. 91, s-s. 27, of the B. N. A. Act, 1867, but were matters belonging to the "organization of Provincial Courts," within the meaning of s. 92, s-s. 14, and therefore *intra vires* of the Provincial Legislature.

*Held*, (6), that the venue was sufficiently stated in the record, and that the marginal venue, "British Columbia, to wit," was at the lowest but an imperfect venue, and therefore cured by s. 23, Criminal Procedure Act, 1869.

*Held*, per Crease, J., that the statement of the imposition of conditions in an order under s. 11, 32 & 33 V. c. 29, is not jurisdictional.

*Held*, per Begbie, C.J., that any application for an order for a change of venue under s. 11 should be made as early as possible after the commitment.

*Held*, by Gray, J., after argument before himself and brother Justices, sitting as assessors, on a case stated, that on a trial on a charge of felony the prisoner is not entitled, in this Province, as of right, to have the jury polled; and that where, in such a trial after verdict given, the prisoner's coun-

sel moved to have the jury polled, but the Court perceived nothing to create a doubt respecting the agreement and concurrence of the whole jury, the motion was properly refused.

### REGINA v. MALOTT.

*Criminal Law—Plea to jurisdiction—Venue—32 & 33 V. c. 29, s. 11—Validity of Commission of Oyer and Terminer—Power of Lieutenant-Governor to issue—Assize Court Act, 1885—Sheriffs' Act, 1873—Sheriffs' Amendment Act, 1878.*

The prisoner, charged with the commission of the crime of murder in the Kootenay District, was brought for trial in a Court of Oyer and Terminer held at Kamloops, under the Assize Court Act, 1885, by one of the Judges of the Supreme Court, who was also named in the Commission of Oyer and Terminer issued by the Lieutenant-Governor.

The prisoner pleaded to the jurisdiction, stating that the scene of the alleged homicide was in Kootenay District; that no order changing the venue had been made under s. 11 of 32 & 33 V. c. 29; that in the absence of such an order the prisoner could not be tried elsewhere than in Kootenay District, and by a jury of the *visne*; and further, that the Court professing to sit and act under a commission from the Lieutenant-Governor was improperly constituted.

*Held*, by Walkem, J., (1) that as British Columbia had never at any time been divided into districts for purposes relative to the administration of justice in criminal cases, the Province was but one venue; that, therefore, there was no necessity for an order under s. 11 to entitle the Crown to proceed at Kamloops; that the jury, having been summoned under the Jurors' Act, 1860, was a proper and lawful jury.

(2) (following the *McLeans'* case), that the Lieutenant-Governor is authorized, under s. 129, B. N. A. Act, to issue commissions of Oyer and Terminer.

(3) That even if the commission was invalid, a Court of Oyer and Terminer, if presided over by a Judge of the Supreme Court, would be, under the combined effect of s. 14 of the Judicature Act, 1879, and the Assize Court Act, 1885, properly constituted.



*Held*, upon argument before the Court on a writ of error, that the prisoner was improperly arraigned, and that the proceedings at Kamloops were null and void.

*Held*, also, that British Columbia had been divided into districts for purposes relative to the Administration of Justice in Criminal Cases by the Sheriffs' Act, 1873, and the Sheriffs' Amendment Act, 1878.

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[THE DIVISIONAL COURT.]

REGINA v. GOLD COMMISSIONER OF VICTORIA DISTRICT.

*Constitutional Law—Mandamus—S. 14 Chinese Regulation Act, 1884—S. 20 Mineral Act, 1884—Free Miner's License—Differential taxation—B. N. A. Act, 1867, s. 92.*

*Held*, by the Divisional Court, consisting of Begbie, C.J., Crease, Gray and McCreight, JJ., that s. 14 of the Chinese Regulation Act, 1884, declaring that "no free miner's certificate shall be issued to any Chinese except upon payment of fifteen dollars," was an attempt to impose a differential tax on the Chinese, and, therefore, *ultra vires* of the Provincial Legislature.

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[BEGBIE, C. J.]

KEEFER v. TODD.

*B. C. "Replevin Act, 1873"—Procedure—Court of Record for British Columbia—Constitutional Law—B. N. A. Act, 1868, s. 92, s.-s. 10 (a) (c), and s.-s. 14 and s. 101—"Provincial," meaning of—31 V. c. 28 (D)—32 & 33 V. c. 24 (D.)*

On an application to set aside a writ of replevin under the B. C. Statute, 1873, c. 24 :

*Held*, that the affidavit under s. 4 need not state that the deponent is the servant or agent of the claimant.

*Held*, that the delivery to the sheriff of the bond required by s. 5 is not a necessary preliminary to the issuing of the writ of replevin, but to the sheriff's acting upon such writ.

Although the Peace Preservation Act, 1869, 32 & 33 V. c. 24, (D.), makes no provision for the appointment of a Commissioner under that Act, yet its provisions can be enforced here by a Commissioner appointed for the Province under the Canada Police Act, 31 V. c. 18, (D.) as such Police Commissioner is a Justice of the Peace in respect of the criminal laws and other laws of the Dominion.

The Peace Preservation Act, 1869, and the Canada Police Act, 1868, can be enforced in this Province, as they are *intra vires* of the Parliament of Canada, under s. 101 and s.-s. 10 (a), (c), s. 92, of B. N. A. Act, 1867.

The word "Provincial," in s.-s. 14, s. 92, B. N. A. Act, 1867, is to be read in its political, and not in its geographical, sense.

The Court of a Police Commissioner is a Court of Record for British Columbia, within the meaning of s. 2 of the B. C. Replevin Act.

## CARSON v. CLARK.

*Water-rights—Ditches—Riparian proprietors—Adjacent lands.*

On the construction of the Land Ordinances and Acts:

*Held*, that under s. 44, of the Land Ordinance, 1865, no person is empowered to take water from any stream who is not at common law a riparian proprietor.

*Held*, that the Commissioner should, before granting any authority to divert water under the Land Acts, see that all the requirements of the Statute have been complied with, but that the applicant is responsible for the insufficiency of his record.

*Semble*, that even prior to passing s. 50, no exclusive right could be acquired until such ditch was constructed.

*Held*, that s. 44 of the Land Ordinance, 1865, did not enable persons to acquire water-rights as against riparian owners of land acquired prior to the passage of that Act.

The duties of a Commissioner in considering applications for water under Land Acts, pointed out.

[GRAY, J.]

## SEHL v. HUMPHREYS.

*Homestead Amendment Act, 1873—Exemption from execution—Seizure by sheriff—Costs of seizure.*

*Held*, that where a judgment debtor claims the benefit of the Homestead Amendment Act, 1873, in respect of goods seized by the sheriff under a *fi. fa.*, the judgment debtor must pay the sheriff's costs of seizure and possession money.

[WALKER, J.]

## JENNY LIND CO. v. BRADLEY-NICHOLSON CO.

*Water grants—Hill claims—Gold Mining Ordinance, 1867, s. 36—Supreme Court Rules, 1880—Order in Council, form of.*

Each company had a hill-claim, fronting on the right bank of Williams Creek, and depending on its water for the means of mining it. The B. N. Co., whose claim was higher upstream than the J. L. Co.'s, turned nearly all the water of the creek from its bed, at a point on the stream some distance above their claim, and conveyed it by a ditch to their ground, thereby depriving the J. L. Co. of water, and obliging them to stop work.

The B. N. Co. claimed the right to do so, by virtue of s. 36 of the Gold Mining Ordinance, which entitles a miner to use "so much of the water naturally flowing through or past his claim" as may be necessary to work it.

*Held*, reversing the Gold Commissioner's decision, that the water so used by the B. N. Co. was not "water naturally flowing through or past" their claim, as its natural flow had been intercepted and turned into a ditch above the claim, and that the B. N. Co. had, therefore, no right to such water under s. 36.

The J. L. Co., having complied with Part X. of the same Ordinance—referring to "Ditches"—obtained from the Gold Commissioner, in April, 1882, a license to divert 150 inches of water from the creek at their ditch-head, which was higher up-stream than both their and the B. N. Co's claims, and

use it by means of their ditch, on their ground, for mining purposes, for five years. The B. N. Co. held no similar license, either directly or derivatively.

*Held*, that owners of hill-claims could only acquire water privileges such as those claimed in the present action, by complying with Part X.; and that under the circumstances stated, the J. L. Co. had an exclusive right to use 150 inches of water, according to the terms of their license and by virtue of it; and that the B. N. Co., having no similar license, had no right to any of the water of Williams Creek.

*Held*, also, that the grant of a water-privilege, under Part X., need not be by deed.

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## ONTARIO.

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### Supreme Court of Judicature.

#### COURT OF APPEAL.

Q. B. D.]

[1ST FEBRUARY, 1887.

#### BOWEN v. THE CANADA SOUTHERN R. W. CO.

*Railway—Compensation—Damages to land—Consolidated Railway Act of 1879, s. 9, s.-ss. 10, 12 (D.)—Leave of Municipality—Reference to officer of Court—Arbitration.*

The lands in question were lots 3, 4, and 6 on C. Avenue, in the town of N. The defendants had taken for the purposes of their railway a small part of lot 3, and the plaintiff claimed damages for the injury caused to that lot, and lots 4 and 6 by lowering the street in front thereof, to enable the railway to be carried over the highway, in such a manner as to obstruct the plaintiff's access to his land.

*Held*, affirming the judgment of the Court below: (1). That, upon the evidence, the sum paid to the plaintiff for the part of lot 3 actually taken included damages to lot 3, but not to lots 4 and 6.

(2). That the claim as to lots 4 and 6 was for damages suffered by land in the exercise of the powers granted for the railway, within the meaning of the Consolidated Railway Act, 1879, s. 9, s.-ss. 10 and 12 (D.).

*Held*, also, that there was nothing to exonerate the defendants in the fact that they had the leave of the municipality for doing as they did.

*Held*, also, that the Court had no power to compel a reference to an officer of the Court to ascertain the damages, but only to compel an arbitration, to which the plaintiff was entitled under the Act.

*Quære*, per OSLER, J.A., whether the compensation clauses of Part I. of the Consolidated Railway Act, 1879, apply to the defendants' railway ; but

*Held*, per BURTON, J.A., that they apply at least to the Welland branch of the defendants' railway, on which the work in question was done.

*Cattanach* and *H. Symons*, for the appellants.

*McClive*, for the respondent.

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C. P. D.]

McGIBBON v. THE NORTHERN & N. W. R. W. CO.

*Railway—Negligence—Fire caused from engine—Evidence—Withdrawing case from jury.*

The judgment of the Court below, 11 O. R. 307; 6 C. L. T. 150, was reversed on appeal.

The action was for negligence, whereby, as alleged, fire escaped from the defendants' engine, and destroyed the plaintiff's property.

There was evidence that the engine had passed just before the fire was perceived in a certain manure heap, from which it spread to the destroyed property ; that a strong wind blew across the track towards the manure heap ; that there was no other source from which the fire was at all likely to have come ; that the wind was in the wrong direction to have carried sparks from a certain saw-mill close by, and that cinders were found in the straw by those who went to put out the fire.

*Held*, that from these facts, the jury would clearly have been justified in finding that the mischief was caused by the engine.

The evidence further shewed that the engine had run 90 miles without the ash-pan being emptied, that ignited substances were found upon the manure heap, which, being too large to pass through the net of the smoke stack, must have come from the ash-pan; that the ash-pan was perfectly good, and so constructed that it was very difficult for ashes to escape from it, and that the possibility of an escape would be prevented by emptying or partly emptying the pan.

*Held*, that the jury might have found as legitimate inferences of fact that the fire escaped because the pan was full, and that the result might, with reasonable care, have been avoided; there was therefore evidence of negligence to go to the jury, and the non-suit was improperly entered.

*Lash, Q.C.*, for the appellant.

*Robinson, Q.C.*, and *Boulton, Q.C.*, for the respondents.

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ROSE, J.J.]

## PRESTON v. THE CORPORATION OF CAMDEN.

*Municipal Corporation—Bylaw—Drainage—Injury to land—Negligence—Findings of jury—Compensation—Arbitration—Municipal Act, 1883, ss. 576, 591.*

The defendants deepened and widened a drain through the plaintiff's land, and threw up the earth on either side and left it there. The plaintiff brought this action for damages to his land, etc., in the course of construction, and by the throwing up of the earth. It was admitted that the work was done under a bylaw, passed under s. 576 of the Municipal Act, 1883, and it was not suggested that the bylaw was defective in form or substance, or for want of authority to pass it. The jury found that the defendants were not guilty of any negligence, but that the plaintiff had suffered damage by the execution of the work.

*Held*, reversing the decision of Rose, J., that upon these findings judgment should have been entered for the defendants; that a cause of action could not accrue from the doing

of a lawful act, unless in a negligent manner; and that the plaintiff's remedy, if any, was by arbitration to obtain compensation under the Municipal Act of 1883, s. 591.

*Matthew Wilson*, for the appellant.

*Pegley*, for the respondent.

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C. C. KENT.]

## STEINHOFF v. THE CORPORATION OF KENT.

*Negligence—Accident—Draw-bridge—Liability.*

The defendants were the owners of a bridge over a navigable stream, having in it a draw or swing to allow vessels to pass through. A horse of the plaintiff broke away from the person in charge of him, ran from a distance of two miles to the bridge, reaching it in broad daylight, just as the bridge was swung open, rushed into the gap, and was drowned.

*Held*, affirming the judgment of the Court below, that the loss of the horse was owing to no negligence on the part of the defendants in failing to guard the approach to the bridge, or to use signals, and the plaintiff could not recover.

*J. S. Fraser*, for the appellant.

*Pegley*, for the respondents.

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## High Court of Justice.

### QUEEN'S BENCH DIVISION.

[ROSE, J., 7TH FEBRUARY, 1887.]

## LANGSTAFF v. LANGSTAFF.

*Will, construction of—Annuity—Charge on land.*

The testator bequeathed to his son M. an annuity of \$40 a year during his natural life, to be paid to him "by my son J. or his heirs or assigns." To J. he devised certain land, but did not expressly make the devise subject to the payment of the annuity.

*Held*, nevertheless, that the annuity was a charge upon the land devised.

*Robson v. Jardine*, 22 Gr. 420, followed.

*E. Douglas Armour*, for the plaintiff.

*A. H. Meyers*, for the defendant.

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### CHANCERY DIVISION.

[THE DIVISIONAL COURT, 8TH JANUARY, 1887.]

#### THE TORONTO BREWING AND MALTING COMPANY v. HEVEY.

*Principal and surety—Representation on which bond executed—Findings of jury.*

The defendant agreed to become security with McG. for McB. to the plaintiffs. Plaintiffs' solicitor sent two bonds to his agent for execution, one to be executed by defendant and the other by McG. The agent attended defendant to get his bond executed, and in answer to a remark of defendant (made before he signed the bond), that McG. had promised to sign a bond too, told him that a bond had been sent up to be signed by McG. Defendant then signed the bond, but McG. subsequently refused to sign his.

The jury found that a statement was made leading defendant to suppose that the bond executed was conditional upon the execution of the proposed bond from McG., and that its execution was obtained by a false, although unintentionally false, representation.

*Held*, affirming the decision of O'Connor, J., that the plaintiffs could not recover.

*J. MacLennan, Q.C.*, and *Kingsford*, for the plaintiffs.

*R. M. Meredith*, for the defendant.

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[GALT, J., 12TH JANUARY, 1887.]

## THOROLD MANUFACTURING COMPANY v. IMPERIAL BANK.

*Company—Cheque to order of company—Indorsement by Secretary—Sufficiency of.*

Action to recover the amount of a cheque made payable to the order of the plaintiffs, and alleged to have been paid by the defendants (but not to the plaintiffs) without the proper indorsement of the plaintiffs.

The by-laws of the plaintiffs' company provided that all moneys should be received by the treasurer and deposited by him to the credit of the company, and drawn out on cheques made by the secretary and countersigned by the treasurer.

It appeared that the property of the company belonged almost entirely to R. B. M., who was president and treasurer, and whose son R. D. M. was secretary.

On the occasion when the cheque was given, R. D. M. had gone to the makers of the cheque to receive the money for certain goods supplied to them by the plaintiffs, and had received the cheque, which he indorsed in the name of the plaintiffs, signing his name as secretary.

It appeared that on several previous occasions he had done the same thing with cheques drawn on the defendants, who had no reason to believe that he was exceeding his authority; and it also appeared that he had acted as general agent of the plaintiffs' company.

*Held*, that the plaintiffs could not recover, and the action must be dismissed.

*Osler, Q.C.*, for plaintiffs.

*R. Gregory Cox*, for defendants.

[PROUDFOOT, J., 8TH JANUARY, 1887.]

## HATTON v. BERTRAM.

*Will, construction of—After acquired property—Devise of estate by name—Subsequent additions—Completion of building commenced by testator.*

J. C. devised to J. B., G. E. S., and J. F. D. all his property and effects real, personal, and mixed, upon trust to

hold "that part of my property known as Walkerfield, being the property I now reside upon, containing 50 acres more or less, until the same shall be sold by them, as hereinafter provided, for the use and behoof of my daughter E. M. C., so long as she may desire that the same should remain unsold, and should she desire the same to be sold, then to hold the proceeds of the same upon the same trusts and for the same purposes as hereinafter directed with regard to the sum of \$40,000, hereinafter directed to be set out." He then directed his trustees to set apart the sum of \$40,000 to be held by them upon certain trusts, and also a certain further sum to provide an annuity of \$1,200 for his wife; and provided that after the said two funds should have been set apart, the residuary estate should be divided among his nephews and nieces, and lastly he gave to his trustees "full and absolute power to sell and dispose of all his lands (Walkerfield if sold in my daughter's lifetime to be sold with her consent only) at such time or times and in such manner as to them may seem best."

The will was made on 10th September, 1879, and J. C. died 18th December, 1885. After making the will, on 27th June, 1883, J. C. purchased five acres, and on 21st September, 1883, another five acres, forming a block of 10 acres, of which one corner nearly coincided with one extremity of a diagonal of Walkerfield. On 22nd November, 1884, he sold a piece of about three and one-third acres of Walkerfield.

In his lifetime, J. C. entered into a contract in writing for the erection of a dwelling house on "Walkerfield," which was not completed at his death, and since his death the executor had paid to the contractor and architect certain sums in respect to it.

*Held* (1). That the daughter was tenant for life of Walkerfield, and after her death her children took the proceeds of sale as she might appoint, and in default of appointment equally, and in default of children the residuary legatees took (2). That the ten acres subsequently purchased passed under the devise of Walkerfield, the evidence clearly showing that he bought it to form part of Walkerfield (3). That the funds to build the house must come out of the residue.

*Moss, Q.C.*, for the plaintiff.

*Lash, Q.C.*, for the adult defendants.

*J. MacLennan, Q.C.*, for the infant defendants.

[FERGUSON, J., 8TH JANUARY, 1887.]

## HYMAN v. HOWELL.

*Assignment for creditors—Attacking fraudulent preference—Costs of useless legal proceedings.*

W. on 7th March, 1884, assigned all his estate by deed to B., himself a creditor of W., in trust for the creditors of W.

On 18th March, 1884, at a meeting of creditors held by B., it was resolved with B's consent, that M., an execution creditor of W., should bring an action on behalf of all the creditors of W., to contest the validity of a certain chattel mortgage made to H. & Co. by W., prior to the above assignment to B. M. accordingly brought the action, the costs of which the creditors present agreed should be borne by the estate. H. & Co. were not present at the meeting. The action was dismissed with costs, and B. paid the defendants' (H. & Co's) costs of that action, and also the costs of the solicitor who acted for M. out of the moneys of the estate, \$462 in all. H. & Co., being large creditors of W., now brought this action, asking that the executors of M. should pay the \$482 to B., to be distributed among the creditors of W.

There was no evidence of M. or his creditors having requested B. to pay the \$462 of costs.

*Held*, that as to \$300, the costs paid to M.'s solicitor, no request on M.'s part to B. to pay this to the solicitor could be implied, for M. did not retain the solicitor or manage the proceedings, but merely allowed his name to be used as plaintiff, because it was thought the action could not succeed with B. as plaintiff, and M. was not liable to the said solicitor as to these costs, and therefore the plaintiffs failed as to this sum.

*Held*, also, that the plaintiffs could not succeed as to the balance, \$162, for there could be no reasonable doubt that they knew these moneys, which were paid to them by B. as their costs of defence, were moneys of the estate of which B. was trustee, and must be held to have assented to the money being so paid. See *Dillon v. Raleigh*, 13 A. R. 53, at p. 67, 68.

*Gibbons*, for the plaintiffs.

*Lash, Q. C.*, for the executors of M.

*Barber*, for the defendant B.

## COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 24TH DECEMBER, 1886.]

## CITIZENS INSURANCE COMPANY v. CLUXTON.

*Principal and surety—Change in position of principal debtor—Release of surety—Renunciation clause—Joint contractors.*

Action against defendants as sureties on a bond, given to the plaintiffs to secure the faithful and diligent performance of the duties of the principal (B.) to the plaintiff, including the paying over of moneys, as to which there was alleged to be default. The bond recited that B. had been appointed agent for the plaintiffs for the Province of Ontario, to discharge certain duties, and to receive certain moneys, according to the instrument appointing him to which reference was made. The condition was for the performance of such duties and payment over of moneys for which B. should be responsible as agent. The bond also contained the following clause: "And the said sureties in consideration of the premises hereby agree to waive any notice of any default the said B. may at any time make in his duties as such agent, and to renounce to the benefits of division, discussion, and all other benefits of sureties, consenting to be bound as fully in all respects as the said principal party." The agreement referred to provided that B. should be general agent for the Province, should have control over all local agents, except some six agencies, including Hamilton and Galt, and his compensation should be a commission of 35 per cent. on all business obtained by himself or the agents under his control, he to pay the agents thereout, and a salary of \$75 a month, which was to include travelling expenses; and on renewals 30 per cent. The plaintiffs afterwards added Hamilton and Galt to his agencies.

Subsequently the outside agencies were taken away from B., and his business was confined to Toronto; he relinquished his commission on all outside agencies, and it was intimated to him that at the close of the then current year his salary would have to be re-arranged.

*Held*, that the taking away of the sub-agencies was such a change in B.'s position as could not be said to be, without

inquiry, evidently unsubstantial and not prejudicial to the sureties, and would of itself discharge them; but as to adding Hamilton and Galt, it could not be said on the evidence to have such effect.

*Held*, also, that the effect of the renunciation clause was to place the principal and sureties in the position of joint contractors; that the agreement confining B.'s business to Toronto amounted to a new contract, and that the sureties would only be liable for default up to the date of such new contract, but not thereafter.

*Robinson, Q.C.*, for the plaintiffs.

*Moss, Q.C.*, and *George Macdonald*, for the defendants.

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[CAMERON, C.J.]

*In re* THE HAMILTON AND MILTON ROAD COMPANY AND THE CORPORATION OF EAST FLAMBOROUGH.

*Municipal Corporation—Bylaw, illegality of—Sale by one road company to another—Defective organization of company—Minority of a corporator—Sale abortive.*

The H. & M. Road Co., owners of a certain road, and in possession thereof as a toll-road, levying and collecting tolls thereon, assumed to sell the road in 1879 to the H. & F. Road Co., who entered into possession thereof. Subsequently it was held by the Court of Appeal, on appeal from the judgment of Wilson, C.J., that the H. & F. Road Co. was not duly incorporated, because, while the Joint Stock Companies' Act, R. S. O. c. 152, requires at least five corporators to enable a company to be incorporated, there were not five here, one of the five alleged corporators being a minor. The corporation of the township of East Flamborough thereupon passed a bylaw assuming possession of the road, which the H. & M. Road Co. now moved to quash.

*Held*, that the effect of the judgment of the Court of Appeal was to restore to the applicants the franchise they held before the abortive sale took place, the road having been kept alive as a toll-road, and required as such from time to time, and nothing having transpired to justify the municipal corporation

in interfering with the road or assuming possession and control of it, as the bylaw authorized them to do ; the bylaw was therefore illegal and should be quashed.

*Lash, Q.C.*, for the applicants.

*Osler, Q.C.*, contra.

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[PROUDFOOT, J.]

### COATES v. COATES.

*Contract—Specific performance—Statute of Frauds—Part performance.*

A. brought an action against B., for the rents and profits of certain lands, which had belonged to the father of A. and B., who died intestate, which lands B. had taken and held possession of for several years. On the action being entered for trial a settlement was arrived at, by which the action was to be stayed upon the undertaking of B. to obtain certain releases, etc. B.'s counsel appeared in Court when the case was called for trial, and stated that it was settled, and an entry was made in the Court minute book that the case was "settled out of Court." Subsequently B. required certain releases to be obtained by A., which A. agreed to and did procure, and complied with all B.'s conditions, but B. refused to complete the agreement.

In an action by A. to compel B. to perform the agreement, in which B. set up the Statute of Frauds,

*Held*, that the staying of the action was a sufficient part performance to withdraw the contract from the operation of the statute, because (1). It was an act referring to a contract consistent with the alleged one (2). It would lead to fraud to allow the defendant to escape from performance, because the contract was not in writing (3). The contract was such a one as would have been enforced had it been in writing (4). The contract was fully proved.

*Aylesworth*, for the plaintiff.

*Wm. Kerr, Q.C.*, and *R. S. Cassels*, for the defendant.

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## IN CHAMBERS.

[GALT, J., 3RD FEBRUARY, 1887.]

## MASSIE v. TORONTO PRINTING CO.

*Landlord and tenant—Attachment of debts—Rent—R. S. O. c. 136, ss. 2-6—  
Mortgagor and mortgagee.*

R. S. O. c. 136, ss. 2-6, does not contemplate any alteration of the law where the case remains strictly between landlord and tenant, but makes a severance where a third interest intervenes.

And where a judgment creditor garnished rents accruing due from several tenants to the judgment debtors before any of the gale days had arrived,

*Held*, that he was entitled to payment over upon the gale days of the proportion of the rents which had accrued due on the day of service of the attaching order.

*Quære*, whether the rents could be garnished against a mortgagee of the landlord.

J. F. Dunbar, for the plaintiff.

Ingles, for the defendants.

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[PROUDFOOT, J., 31ST JANUARY, 1887.]

## PARKER v. MERIDEN SILVER PLATE CO.

*Discovery—Examination of party resident out of jurisdiction—Convenience—  
Diligence.*

An appeal by the defendants from an order of the Master in Chambers, requiring Mr. Caspar, the president of the defendants, whose home was in Meriden, Connecticut, to attend for examination by the plaintiff for discovery at Toronto at his own expense. Mr. Caspar arrived in Toronto on the 5th of November, 1886, to be present as a witness at the trial of the action on that day. The trial was then adjourned at the defendants' request till the 9th November, Mr. Caspar remaining in Toronto during the intervening

days. On the 8th of November the defendants filed a supplementary affidavit on production, and notified the plaintiffs that they had done so, and later on the afternoon of the same day the defendants served notice that they would the next day apply for a further adjournment of the trial. On the morning of the 9th the trial was adjourned till the next sittings, and on the afternoon of that day Mr. Caspar was in the act of leaving his hotel for the railway station, to take passage for his home in Connecticut, when, about ten minutes before his train was timed to leave, he was served with an appointment and subpoena to attend for examination on the 12th November before a special examiner at Toronto, and paid \$5 as conduct money. Mr. Caspar disregarded the appointment and left by the train, and a motion was afterwards made to compel him to attend for examination at his own expense, upon which the Master in Chambers made the order appealed from.

*Walter Barwick*, for the defendant.

*Walter Macdonald*, for the plaintiff.

*Smith v. Greey*, 11 P. R. 345, and *Bolckow v. Foster*, 7 P. R. 388, were referred to.

PROUDFOOT, J., was of opinion that the plaintiff had acted with reasonable diligence in taking steps for the examination of the president of the defendants. The necessity for examining him evidently arose when the plaintiff learnt that a further affidavit of documents had been filed, and that the trial was to be postponed till the next sittings. Until the plaintiff heard of these matters he naturally supposed that the trial was coming on, and that only such documents as the defendants had up to that time produced could be used at it, and that there would be no greater necessity for examining the president than there was before the 15th November. Under these circumstances the argument that the president might have been examined between the 5th and the 9th, and that it was unreasonable to serve him just when he was leaving Toronto and inconvenient for him to remain, could have no weight. The appeal was dismissed with costs.

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## BOOK v. BOOK.

*Pleading—Mortgage action by executors—Invalidity of will as a defence.*

In an action by executors to enforce a mortgage made to the testator, her son, the defendant, set up as a defence the invalidity of the will and probate obtained by the executors.

*Held*, that the question whether this was a good defence was an arguable one, and the pleading should not have been summarily struck out in Chambers.

The statement of claim alleged that the plaintiffs were the executors of the will of Maria Book, deceased, that her will was duly proved in the proper Surrogate Court, and asked to have a mortgage made by the defendant to the testatrix enforced by sale, etc.

The statement of defence alleged that the executors had obtained probate of the will *ex parte* and in common form, and not in solemn form, and that the probate was not binding upon the defendant, who was a son and one of the heirs-at-law and next of kin of the testatrix; and further that the will was invalid for want of form, and want of capacity in the testatrix and undue influence. In addition to this the defendant set up a defence on the merits of want of consideration for the mortgage, etc.

The plaintiff moved to strike out the part of the defence first above referred to, denying the validity of the will and probate, and the Master in Chambers made an order striking out such part, from which the defendant now appealed.

*Moss, Q.C.*, for the appellant. This Court has power to try the validity of the will whether probate has been granted or not: *Perrin v. Perrin*, 19 Gr. 259; *Wilson v. Wilson*, 22 Gr. 39, 24 Gr. 377. As the Court has power to try that question, it matters not whether the question is raised by the statement of claim or the statement of defence. Even if this is not a good defence to the action, the Master should not have struck it out; it is not frivolous or embarrassing; the plaintiff's proper course was to have demurred if he thought the pleading bad; see *Brice v. Munro*, 10 P. R. 548, and Rule 178. And further, if it is conceded that it is not a defence and that it was properly struck out, the Master should have allowed the defendant to set up the same matters by way of counter-claim, asking to have the will declared invalid. The defendant would not be safe in paying the money to these

executors, it would not be a discharge, if what he alleges is true: *Ex parte Jolliffe*, 8 Beav. 168; *Allen v. Dundas*, 3 T. R. 125. In England, it is true, the Court of Chancery would not have interfered where probate had been granted, but that is because the Ecclesiastical Courts had sole jurisdiction there in such matters; *Kerrick v. Bransby*, 7 Bro. Parl. Cas. 437; *Archer v. Mosse*, 2 Vern. 8; *Hargrave's Law Tracts*, 459, 461, 463.

*Holman*, for plaintiff, contra, referred to *Williams on Executors*, 597; *MacLennan's Jud. Act*, 2nd Ed., 324-7; *Howell's Surrogate Court Practice*, 333-5; R. S. O. c. 46, s. 57; *Canadian Securities Co. v. Prentiss*, 9 P. R. 324; *Watson v. Rodwell*, 3 Ch. D. 380.

PROUDFOOT, J. I think this is not a case that should have been dealt with in this summary way. I agree with the remarks of Mr. Justice Rose in *Brice v. Munro*, as to the manner in which the power of striking out pleadings should be exercised. The question whether the defence is good in law is an arguable one. It may be that it is necessary to have the will and probate set aside by an independent proceeding before the defendant can resist payment, but there is strong reason to suppose that if the will can be attacked in one way, it can in another. The appeal will be allowed with costs and the pleading restored, with leave to the plaintiff to reply and demur.

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[4TH FEBRUARY, 1887.]

### HOGG v. CRABBE.

*Costs—Taxation—Costs of the day—Counsel fee.*

Under an order made at the Assizes, postponing the trial upon payment of the "costs of the day," the party receiving the costs is only entitled to tax one counsel fee of \$10.

*H. J. Scott, Q.C.*, for the plaintiff.

*Middleton*, for the defendant.

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[FERGUSON, J., 10TH FEBRUARY, 1887.]

### *In re* CHRISTIE; CHRISTIE v. CHRISTIE.

*Appeal—Forum—Divisions of High Court—Ontario Judicature Act, s. 25, s-s. 2*

The defendants desired to appeal from a Master's Report in an action begun in the Chancery Division, and, in order

to bring on the appeal before the report was confirmed, set it down for hearing at a sittings of chambers in the Q. B. & C. P. Divisions to be held on Friday the 4th February. The Judge who held chambers on that day declined to hear the appeal, and it was brought on before a Judge of the Chancery Division on Monday the 7th February, after the report had become confirmed by lapse of time.

*Held*, that the setting down for the Friday was a nullity, having regard to the provisions of the Ontario Judicature Act, s. 25, s-s. 2, and could not avail the defendants to make their appeal in time.

*Laidlaw v. Miller*, 11 P. R. 335, not followed.

*P. McPhillips*, for the appellants.

*E. Douglas Armour*, for the respondent.

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[O'CONNOR, J., 27TH JANUARY, 1887.]

### REGINA v. DUNNING.

*Conviction—Weights and Measures Act, 1879—Certiorari—Appeal to Sessions—33 V. c. 27, s. 2—Imprisonment—Criminal charge—Evidence of accused.*

Upon a motion for a *certiorari* to remove a conviction, under the Weights and Measures Act, 1879, for obstructing an assistant inspector of weights and measures in the discharge of his duty,

*Held*, that when an appeal from a conviction has been had and heard at the General Sessions of the Peace, a *certiorari* may be moved for within six months after the order of sessions confirming the conviction; but in this case the right to *certiorari* is taken away by 33 V. c. 27, s. 2, supplemented by 49 V. c. 49, s. 7, and

*Held*, also, that the latter Act applies to convictions made before it was assented to as well as after.

*Held*, also, that magistrates have power to impose imprisonment in default of sufficient distress upon conviction for an offence under this Act.

*Held*, also, that the offence was in the nature of a crime as it was interfering with a public officer in the discharge of

his duty and might have involved a breach of the peace, and therefore the magistrates were right in rejecting the evidence of the defendant.

*F. M. Macdougall*, for the motion.

*W. H. P. Clement*, and *W. J. Code*, contra.

[3RD FEBRUARY, 1887.]

REGINA v. CYR.

*Conviction—Keeping bawdy-house—Uncertainty—Place where offence committed—Forfeiture of penalty—32 & 33 V. c. 31, s. 17—Costs.*

Upon a motion, on the return of a *habeas corpus*, to discharge the prisoner, who was convicted of keeping a house of ill-fame,

*Held*, that the conviction was bad on its face for uncertainty in not naming a place where the offence was committed.

*Held*, also, that it was defective because it did not contain an adjudication of forfeiture of the fine imposed.

The Act 32 & 33 V.c. 31, s. 17, provides that the magistrate may condemn the party accused to pay a fine not exceeding, with the costs in the case, \$100.

*Held*, that the meaning of this is, that the amount of the costs in the case shall be deducted from \$100, and that the balance or difference shall be the utmost limit of the fine; and that the conviction in this case, being to pay the sum of \$100 without costs, was therefore bad.

*E. F. B. Johnston*, for the Crown.

*Aylesworth*, for the prisoner.

[THE MASTER IN CHAMBERS, 3RD FEBRUARY, 1887.]

CRAWFORD v. GEMMELL.

*Judgment—Admission in notice limiting appearance—Rules 68 & 322.*

This was an action for a money demand.

The defendant entered an appearance and served a notice within four days thereafter, under Rule 68, limiting his defence to the amount claimed, and admitting that a certain

sum was due, and that the defence was only as to the residue of the plaintiff's claim.

*Anglin* (Blake, Lash, Cassels, & Holman), moved under Rule 322 for an order for leave to enter judgment for the plaintiff for the amount admitted by the defendant, and for leave to proceed for the residue claimed.

*Drayton*, for the defendants, contra.

The MASTER IN CHAMBERS held that the words in Rule 98, "the plaintiff is to proceed as if the defendant had filed a defence disputing the amount of the claim," brought the case within the words of Rule 322, "any party to an action may at any stage thereof apply to the Court or a Judge for such order as he may, upon any admission of fact in the pleadings \* \* \* be entitled to;" and that the plaintiff was therefore entitled to immediate judgment and execution for the amount admitted, and to proceed for the residue claimed, delivering a statement of claim, etc.

[See *Jurmer v. Davis*, 23 Sol. J. 462.]

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## NOVA SCOTIA.

### In the Supreme Court.

#### BLACK v. STEWART.

*Impounding cattle—Duty of pound-keeper—Payment of charges—Sale.*

Two of the plaintiff's cattle were distrained as *damage feasant*, and placed in the custody of the defendant, as keeper of a public pound. The plaintiff declined to pay the defendant's charges, on the ground that the cattle were wrongfully impounded, and they were sold to pay the charges.

*Held*, that the defendant was bound to receive the cattle when brought to him, and, whether they were properly impounded or not, he was entitled to be paid his legal charges in respect of their feed and detention before releasing them.

**KING v. THE MUNICIPALITY OF KINGS.**

*Municipal Corporation—Accident—Highway—Negligence—Contradictory findings of jury—Disqualification of jurors.*

The plaintiff sustained severe injuries by falling over a precipitous embankment adjoining a public highway. The locality was known to be dangerous, but no precautions had been taken to guard against accident by fencing or otherwise.

It was admitted that, in the absence of contributory negligence on his part, the plaintiff was entitled to recover.

The jury found that there was such contributory negligence, but they also found that the road required protection between the travelled track and the edge of the bluff, but yet that it was safe after dark for any one who used ordinary care; and they found, in the face of uncontradicted evidence, that the plaintiff had sustained no damage, even assuming that he was entitled to recover.

The findings of the jury, and the verdict for defendants based upon them, were set aside with costs.

*Held*, per McDONALD, J., that c. 109 of the Revised Statutes (5th series), removing certain disqualifications of "Judges, Justices of the Peace, or persons empowered by law to exercise judicial functions," does not apply to jurors.

**MANITOBA.****In the Queen's Bench.**

[FULL COURT.]

**WOLF v. TAIT.**

*Principal and agent—Commission—Variation of terms—Findings of Judge at trial.*

The plaintiff was employed by the defendant to sell for him certain lands upon certain terms. He found a purchaser upon less advantageous terms.

*Held*, that the defendant, having accepted the purchaser and ratified the variation of the terms, was liable for the plaintiff's commission.

The grounds upon which the finding of a Judge upon a question of fact may be reversed were discussed.

An agent is usually entitled to commission upon the whole amount of the purchase money, whether paid in cash or secured by mortgage ; but where the owner himself conducted a part of the negotiation a verdict calculated upon the cash payment was not disturbed.

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### RICHARD v. ROWE.

*Debtor and creditor—Liability—Notice—Business name—Change of name—change of ownership—Election.*

The defendant carried on business under the style Rowe & Co.; she sold to her husband (stipulating that the name of the firm should be changed), and he continued the business under the style, A. Rowe & Co. Before, as well as after the sale, the husband was the actual manager of the business, and beyond the change of name, there was nothing to indicate a change of ownership. The defendant had dealt with the plaintiffs, and her husband continued the account, having agreed to pay the liabilities of the old business.

In an action for the price of goods delivered by the plaintiffs upon the order of Rowe & Co.,

*Held*, that the defendant was not liable.

The defendant's husband, after continuing the business for some time, sold it to the W. T. V. & V. Co., and this company agreed to assume and pay the liabilities of Rowe & Co. Pending this action the plaintiffs recovered judgment against the company for the amount here sued for.

*Held*, that this judgment was evidence of the election by the plaintiffs to look to the company for the old debt.

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### HARRIS v. RANKIN.

*Registered judgment—Form of certificate—Agreement to assign homestead—Voluntary promise to convey—Patent—Evidence of parties to impeached transaction.*

The omission by a registrar to endorse upon an instrument registered, the certificate prescribed by Con. Stat. Man. c. 60, s. 15, does not prevent the instrument binding the lands.

A certificate of judgment was signed by the Deputy Prothonotary, and was under the seal of the Court of Q. B.

The date of the judgment was 18th October, 1883, whereas the certificate referred to a judgment of 18th October, 1884; the number of the roll did not appear upon the certificate, and the certificate did not shew that the judgment was recovered in the Q. B.

*Held*, that the certificate was insufficient.

Under the 42 V. c. 81, s. 34, s-s. 13, homesteads cannot be bound by executions in the sheriff's hands, prior to patent.

Since that Act, a certificate of judgment will bind the homestead of the defendant immediately after recommendation for patent.

Per KILLAM, J. A registered judgment attaches upon land acquired subsequent to its registration.

An assignment of a homestead right previous to recommendation is void not only as between the homesteader and the Crown, but also as between the parties to the transaction (Wallbridge, C.J., dissenting).

In such a case the assignee would not be entitled as against the assignor, even to a lien for improvements placed by the former upon the property.

A voluntary promise to transfer land will not be enforced in equity.

Therefore where a homesteader, free from debt, voluntarily promised, before recommendation, to convey the land to his wife, and after recommendation did so convey,

*Held*, that such conveyance did not, by virtue of the previous promise, cut out a judgment registered before the execution of the conveyance.

After the registration of a judgment against a homesteader who had obtained his recommendation, he assigned the land to a third party to whom the patent issued.

*Held*, that the land was liable, notwithstanding the patent, to answer the judgment.

Under Con. Stat. Man. c. 37, s. 85, only land actually under cultivation is exempt from execution; but land upon which houses, stables, etc., are erected, is also exempt.

Where a whole farm was chargeable under a registered judgment, and only a portion of it under a *fi. fa.*, a reference was ordered to the Master to apportion the latter charge.



*Warne v. Housley*, 3 Man. L. R. followed.

The costs of the suit were added to the registered judgment and charged upon the whole land.

Form of decree in such a case.

Remarks upon the sufficiency of the unsupported evidence of the parties interested to uphold a transaction attacked as fraudulent.

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## WILSON v. THE CITY OF WINNIPEG.

*Municipal corporation—Malicious prosecution—Reasonable and probable cause—Opinion of counsel—Damages.*

A municipal, as well as a trading corporation, may be liable for malicious prosecution.

The mayor of the city, assuming to act as an officer of the city, laid an information against the plaintiff. A firm of solicitors, assuming to act for the city, advised him in the matter, prepared the information and attended upon its return on behalf of the prosecutor. The solicitors reported the matter to the council and the city paid for the solicitors' services.

*Held*, that the city was liable for the action taken by the mayor.

Where the facts are distinct and uncontradicted, and there is no inference of fact, the question of reasonable and probable cause is one wholly of law. But where any fact, or inference of fact, is involved, the question must be determined by the jury under proper direction from the Judge.

Opinion of counsel will not protect from an action for malicious prosecution, unless the party uses reasonable care to ascertain the facts and lay them before counsel.

Damages reduced from \$3,000 to \$500, no express malice having been proved, very little if any damage to reputation having been established, and the plaintiff's arrest having lasted but a few hours.

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**McWILLIAMS v. THE MANITOBA AND NORTH-WESTERN R. W. CO.**

*Railway—Accident—Negligence—Fences—Cattle killed by train.*

A railway company is under no obligation to erect fences along their line, where the land adjoining is unoccupied.

Cattle straying upon the line across such unoccupied land are trespassing, and if injured there, by accident, without negligence, the railway company is not responsible.

In such case the onus as to negligence is upon the party asserting it.

Plaintiff's cattle having been in his yard at nine o'clock one evening, were discovered about ten o'clock the next morning lying wounded alongside the defendants' line of railway; one had a hind foot "mashed up" and one had "a big gash in her leg."

*Held*, that it could be fairly inferred that the injury was caused by an engine or cars running upon the defendants' railway, and under the control of the defendants' servants.

In such a case the presence of certain employees of the railway at the killing and cutting up of the cattle, or even their participation in these acts, would not establish any liability of the company.

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**McKENZIE v. CHAMPION.**

*Principal and agent—Sale of land—Commission—Interest—3 & 4 Wm. IV. c. 42, s. 28.*

Where an agent is employed to find a purchaser, he is entitled to his commission upon production of a person ready and willing to complete the purchase, by entering *bona fide* into an agreement to purchase upon the terms stipulated; or, if the terms be not fully prescribed, then upon the proposed purchaser and the principal entering *bona fide* into an agreement of purchase and sale.

The owner cannot refuse to pay the commission because no agreement in writing actually was entered into; at all events where the reason was that he refused to sign it unless some unusual term was inserted, and where the vendor had

accepted the purchaser and by various acts shewed that he considered that there was a valid verbal contract.

Nor can the owner refuse to pay merely because the purchaser afterwards makes default and unreasonably refuses to carry out the contract.

The agent to find a purchaser merely, will not disentitle himself to his commission by receiving a deposit and giving a receipt for it, at all events where the vendor accepts the deposit.

Interest will not be allowed upon a commission, unless after a demand in writing.

*Quære*, whether the statute 3 & 4 Wm. 4, c. 42, s. 28, is in force in this Province.

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### TODD v. THE UNION BANK OF CANADA.

*Bank—Dishonouring cheques—Time for making inquiries—Misdirection—Damages—New trial.*

The plaintiffs T. and A. carried on business in partnership, and kept their partnership account with the defendants.

On a Friday the bank was served with an order attaching all moneys due by the bank to the plaintiff T. and one Poulin.

On Saturday two of the plaintiffs' cheques, aggregating \$401, were presented and refused, the bank not having by that time determined what position it should assume.

In an action for damages for such refusal, the trial judge told the jury that, if they were of opinion that the bank had exceeded a reasonable time for making all necessary inquiries for their protection, the damages should be substantial but temperate.

The jury found a verdict for the plaintiffs for \$1,000.

*Held*: 1. That there was no misdirection.

2. That the bank had acted with proper, reasonable despatch; that this was a question for the jury; but that, as the jury had misconceived the rights of the parties, there should be a new trial.

3. That the damages were unreasonable and unjust.

## WALLIS v. THE MUNICIPALITY OF ASSINIBOIA.

*Municipal corporation—Liability to repair roads and bridges.*

A municipality is not by the common law answerable in damages occasioned by defective highways or bridges.

A general statute provided that "all the roads and road allowances within the Province shall be held to be under the jurisdiction of the municipality within the limits of which such roads or road allowances are situated, and such municipality shall be charged with the maintenance of the same, with such assistance as they may receive from time to time from the Government of the Province."

*Held*, that this statute did not impose upon municipalities any liability for such damages.

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 DEDRICH v. ASHDOWN.

*Chattel mortgage—Mortgagor selling the goods—Possession—Trespass—Seizure—Pleading.*

The plaintiffs gave to one of the defendants a chattel mortgage upon his stock-in-trade. It contained a covenant that in case the mortgagor should "attempt to sell or dispose of, or in any way part with the possession of the goods, or any of them, or to remove the same, or any part thereof, out of the store and premises . . . without the consent of the mortgagee . . . to such sale, removal, or disposal first had and obtained in writing, it shall be lawful for the mortgagee to take possession," etc. The plaintiffs remained in possession and continued to make sales in the usual course of business.

Shortly afterwards the defendants obtained judgment against the plaintiffs, and under *fi. fa.* goods, caused the same goods to be seized and sold.

In an action in trespass and trover, the defendant pleaded not guilty, not possessed, and justification under the *fi. fa.*

*Held* 1. That under the plea of not possessed, the defendants might set up the chattel mortgage, and the breach of the covenant not to sell.

2. That the covenant not to sell was absolute, and not subject to the implied exception "save in the usual course of business."

3. Trespass may be justified upon any valid ground, and that although some invalid reason may have been given at the time of the trespass.

*Quære*, whether if a mortgagee rightfully seize but wrongfully sell the mortgaged goods, he is a trespasser *ab initio*.

The chattel mortgage provided that upon certain contingencies the mortgagee might seize the goods, and upon, from and after the seizure, the mortgagee might sell etc., and from and out of the proceeds pay and reimburse himself "all such sums and sums of money as may then be *due*, by virtue of these presents."

*Held*, that the mortgagee having rightfully seized the goods, might lawfully sell them, although the mortgage money might not have been payable. Although not payable, it was nevertheless "due."

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## BELCH v. THE MANITOBA & NORTH-WESTERN R. W. COMPANY.

*Company—Appointment of permanent officer—Seal—Pleading—Evidence.*

By resolution the defendants appointed the plaintiff their "permanent Land Commissioner" at a certain salary. The secretary of the company wrote a letter to the plaintiff informing him of the appointment, and at his request affixed the corporate seal to the letter.

The plaintiff sued in assumpsit for wrongful dismissal.

*Held*, that by his pleading, he was estopped from setting up the hiring as under seal.

*Quære*, as to the meaning of the word "permanent."

*Quære*, whether as a matter of law the hiring was under seal.

*Held*, upon the evidence, that the original agreement had been superseded and terminated by a subsequent agreement.

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**KILPATRICK v. THE CITY OF WINNIPEG.**

*Municipal corporation — Liability for work ordered by officials — Adoption — Evidence.*

The plaintiff contracted under seal to erect for the defendants a building to be used as a police station. The contract contained a clause providing for further agreements in writing, in case of any change or alteration in the plans or specifications.

The plaintiff sued for the value of certain work ; part being alterations in the building ; part additional work in connection with the building of a boiler for heating purposes (neither the furnishing of the boiler or its fitting being part of the plaintiff's contract), and part for furnishings for the building, such as benches in the cells ; lockers, railings, desks, and other articles.

The orders for this work were given partly by the chief of police and partly by the license and police committee. The city took possession and made use, by its officials, of the work sued for.

*Held*, that the defendants were not liable for any part of the work.

Oral evidence of that which, upon cross examination, turns out to have been in writing, remains valid as evidence.

**THE MASSEY MANUFACTURING CO. v. GAUDRY.**

*Interpleader — Costs — Discretion — Sheriff — Possession money.*

Although the claimant upon the trial of an interpleader issue succeeds, yet the Court may, in its discretion, refuse to give him costs against the execution creditor.

The Court cannot, however, in such a case order the claimant to pay the sheriff his costs of taking possession of the goods claimed, or his possession money prior to the date of the interpleader order.

## MORRIS v. ARMIT.

*Bailee of chattel—Liability for loss.*

The hirer of a chattel must restore it in as good plight as it was when received, except for that deterioration which ensues in the course of using, from ordinary wear and tear, and for any injury or loss which may have occurred without culpable negligence or misconduct on the hirer's part. He must answer, also, not only for loss and injury inflicted upon the thing by himself in person, but also for the injurious acts of those whom he voluntarily admits, so to speak, into the use of the thing.

The defendants hired from the plaintiff a team of horses. One of the defendants having control of the horses, shot one of them, alleging that it was diseased. Before the shooting the plaintiff informed this defendant that the horse was not diseased. The defendant acted on his own opinion merely, and the evidence shewed that he was wrong.

*Held*, that the defendants were jointly liable for the value of the horse.

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McMILLAN v. BYERS.*Security—Collateral parol agreement—Evidence, admissibility of.*

The defendant entered into an agreement under seal with A., whereby the defendant, for a certain remuneration, agreed to cut cordwood on certain lands, and haul and deliver it at a certain place.

The remuneration not having been paid, the defendant claimed to hold the wood under a collateral parol agreement, by which it was stipulated that in case of default the defendant should be entitled to such security. In replevin by a purchaser from A. of the wood :

*Held*, Dubuc, J., dissenting, that evidence of the parol agreement was not admissible.

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## Supreme Court of Canada.

NOVA SCOTIA]

[15TH FEBRUARY, 1887.

### SOVEREIGN FIRE INS. CO. v. MOIR.

*Insurance—Fire—Condition of policy—Material change.*

A policy of insurance on the respondent's property contained the following provisions:—

“In case the above described premises shall, at any time during the continuance of this insurance, be appropriated, or applied to, or used for the purpose of carrying on, or exercising therein any trade, business, or vocation denominated hazardous or extra-hazardous . . . unless otherwise specially provided for, or hereafter agreed to by this company in writing, or added to, or endorsed on this policy, then this policy shall become void.”

“Any change material to the risk, and within the control or knowledge of the assured, shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent.”

When the insurance was effected the insured premises were occupied as a spool factory and it was described as a spool factory in the application. During the continuance of the policy a portion of the building insured was used for the manufacture of excelsior, but the fact of its being so used was not communicated to the company or its local agent. A loss by fire having occurred the company resisted payment on the ground that the manufacture of excelsior on the premises avoided the policy under the above conditions.

In an action to recover the insurance the respondent obtained a verdict, the jury finding, in answer to questions submitted on the trial, that the manufacture of spools was more hazardous than that of excelsior, and that the risk was not increased by adding the manufacture of excelsior in the building. The Supreme Court of Nova Scotia sustained the verdict.

*Held*, reversing the judgment of the Court below, that as the manufacture of excelsior was in itself a hazardous business, the introduction of it into the building insured would



avoid the policy under the first of the clauses above set out, even if the jury were right in their finding that it was less hazardous than the manufacture of spools.

*Held*, also, that the addition of the manufacture of excelsior to that of spools in the said premises was a change material to the risk, and avoided the policy under the second clause above recited.

*Henry, Q.C.*, for the appellant.

*Borden*, for the respondents.

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## MARSHALL v. MUNICIPALITY OF SHELBURNE.

*Principal and surety—Execution of bond—Evidence.*

In an action on a bond against the sureties of a defaulting clerk of the Municipality of Shelburne, the defence raised was that the bond was not executed by them, as it had no seals attached when the sureties signed it.

*Held*, Henry, J., *hesitante*, that as the respondents had proved a *prima facie* case of a bond properly executed on its face, and neither the subscribing witness nor the principal obligor was called at the trial to corroborate the evidence of the appellant who had not negatived the due execution of the bond, it being quite consistent with his evidence that it was duly executed, the onus of proving want of execution was not thrown off the appellant, and the respondents were entitled to recover.

*Borden*, for the appellants.

*Sedgewick, Q.C.*, for the respondents.

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[17TH FEBRUARY, 1887.]

## PICTOU BANK v. HARVEY.

*Sale of goods—Consignor and consignee—Rescinding contract—Title.*

On 14th July, 1884, H. forwarded a lot of hides from Halifax, addressed to J. L., Pictou, the bill of lading specifying that they were to be carried to Pictou station. H. had been

selling hides to L. for three or four years. An invoice was sent to L. for the price of the hides at the rate previously paid, and L. sent H. a note for the amount, which was discounted. The course of dealing between H. and L. was for H. to receive a note for the amount according to his own estimate of weight, etc., and if there was any deficiency to allow L. a rebate on a final settlement.

This lot of his was put off at Pictou landing and remained there until 5th August. On that day L. sent his lighterman to Pictou landing for some other goods, and he, finding the hides there, took them in his lighter and brought them to L.'s tannery with the other goods. The next day L. on being informed that the hides were at the tannery, had them put in the store of D. L., whom he told to keep them for the parties who sent them, there being at the time other hides of L.'s in the store. The same day, 6th August, L. sent a telegram to H. as follows :—"In trouble. Have stored hides. Appoint some one to take charge of them." H. immediately came to Pictou, and having learned what L. had done expressed himself as satisfied. He did not take possession of the hides, but left them where they were stored, on L.'s assurance that they were all right.

On 6th August a levy was made under an execution of the Pictou Bank against L. on all L.'s property that the sheriff could find, but these hides were not included in the levy. On 12th August, L. gave the Bank a bill of sale on all his hides in the store of D. L., and the bank, on indemnifying D. L., took possession of the hides so shipped by H. and stored with D. L. In a suit by H. against the Bank and D. L.,

*Held*, affirming the judgment of the Court below, that the contract of sale between L. and H. was rescinded by the action of L. in refusing to take possession of the goods when they arrived at his place of business and handing them over to D. L. with directions to hold them for the consignor, and in notifying the consignor who acquiesced and adopted the act of L. whereby the property and possession of the goods became revested in H., and there was consequently no title to the goods in L. on 12th August, when the bill of sale was made to the Bank.

*Sedgewick, Q.C.*, for the appellants.

*Borden*, for the respondents.

## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

ARMOUR, J.]

[4TH NOVEMBER, 1886.

## SANDERSON v. McKERCHER.

*Sale of land—Joint purchase—Parol agreement—Resulting trust—Statute of Frauds.*

Certain land was conveyed by G. to the plaintiff, part of the price having been paid by the plaintiff, and part by the defendant; the conveyance was deposited with the plaintiff, who also received the rents.

There was no agreement or memorandum in writing between the parties to shew the real nature of the transaction, but the defendant alleged that he was a joint purchaser with the plaintiff, and set up an express verbal agreement that the plaintiff would execute a conveyance of an undivided half of the lands to the defendant, and also contended that the dealings shewed a resulting trust in his favour for one half of the estate.

*Held*, reversing the judgment of Armour, J., Hagarty, C. J. O., dissenting, that upon the evidence the conclusion that the purchase was a joint one was not warranted, and that the evidence did not shew a resulting trust, or sustain the agreement set up by the defendant.

*Per* HAGARTY, C. J. O. The plaintiff and defendant purchased the lands upon joint account, there is a resulting trust in favour of the defendant, and the Statute of Frauds is no bar to the enforcement of the defendant's rights.

*Per* BURTON, J. A. Such a trust must result from payment of an aliquot portion of the purchase money, and be of an aliquot part of the estate, and must arise at the time of the conveyance; the dealing here could not have the effect of raising such a trust. The Statute of Frauds would prevent the defendant from succeeding upon the verbal agreement, even if it had been supported by the evidence.

*Per* PATTERSON, J. A. The evidence did not shew that the parties had contributed equal amounts, and unless it so appeared upon an accurate taking of the accounts, a resulting trust of a moiety of the estate could not arise. The payments made by the defendant were made as a purchaser on his own behalf only in the event of the plaintiff not desiring to retain the whole farm, and the result of the verbal agreement was that the plaintiff held the land to the use of himself and the defendant unless and until he elected to hold it in severalty, from which event he held it to his own use, subject to the defendant's lien for the moneys paid by him.

*Moss, Q.C., and Garrow, Q.C., for the appellant.*

*J. MacLennan, Q.C., and M. G. Cameron, for the respondent.*

AWARD OF ARBITRATORS.]

[1ST FEBRUARY, 1887.]

*In re* MACKLEM AND THE NIAGARA FALLS  
PARK COMMISSIONERS.

*Will, construction of—Forfeiture—Condition subsequent—Expropriation of lands—Award.*

T. C. S. devised to M. his estate of Clark Hill, with the islands, lands, and grounds appertaining. M.'s grandmother by her will directed her executors to pay him \$2,000 a year, so long as he should remain the owner and actual occupant of Clark Hill, "to enable him the better to keep up, decorate, and beautify the property known as Clark Hill, and the islands connected therewith."

*Held*, that the expropriation, under an Act of the Legislature, of part of the Clark Hill estate, did not in any way affect M.'s right to this annuity; and therefore in awarding compensation to M. for the lands expropriated the arbitrators properly excluded the consideration of a contemplated loss by M. of this annuity.

A failure by M. to reside and occupy would be in the nature of a forfeiture for breach of a condition subsequent, and his right to the annuity would continue absolute until something occurred to divest the estate, which must be by his own act or default; the *vis major* of a binding statute could not work a forfeiture.

Upon the evidence the Court refused to interfere with the amount of compensation awarded.

*Irving, Q.C.*, for the Niagara Falls Park Commissioners.  
*Robinson, Q.C.*, and *Street, Q.C.*, for the land-owner.

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## High Court of Justice.

### CHANCERY DIVISION.

[THE DIVISIONAL COURT, 21ST FEBRUARY, 1887.]

#### *Re* RAINEY LAKE LUMBER COMPANY.

*Appeal—Divisional Court—Winding up proceeding—45 V. c. 23, s. 78.*

Pending proceedings under an order for the winding up of a company under 45 V. c. 23 (D.), the Union Bank filed a petition praying that the liquidator might be ordered to deliver up certain lumber claimed by the bank. The petition came on to be heard before a Judge in Court, and was adjourned by him for the sake of convenience before the Judge holding the Port Arthur Assizes, who heard the evidence orally and pronounced judgment thereon.

*Held*, that the proceeding at Port Arthur was not the trial of an action, and therefore, and also having regard to the provisions of 45 V. c. 23, s. 78, that no appeal lay to the Divisional Court.

*George Bell*, for the Union Bank.

*J. R. Roaf*, for the liquidator.

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[23RD FEBRUARY, 1887.]

#### POWELL v. PECK.

*Leave to appeal—Discretion—49 V. c. 16, s. 39.*

The order of Proudfoot, J., of the 10th January, 1887, giving the plaintiff leave to appeal to the Court of Appeal from a previous decision, was affirmed on appeal for the reasons given by the learned Judge, ante, p. 44.

49 V. c. 16, s. 39, amends the Ontario Judicature Act, s. 36, by striking out the words "except orders made in the exercise of such discretion as by law belongs to him," and thus gives an appeal to a Divisional Court from every rule, order, or decision made by a Judge in Chambers.

*Held*, that this amendment had the effect of allowing the appeal in this case to be set down and heard, whereas before it would have been struck out, but that it did not alter the rule that such a discretion as was exercised here would not lightly be interfered with; it made an appeal possible but not easy.

*Beck*, for the appellant.

*E. T. English*, for the respondent.

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[BOYD, C., 4TH NOVEMBER, 1886.]

DAWSON v. MOFFATT.

*Husband and wife—Marriage settlement—Wife's after acquired personal property—C. S. U. C. c. 73.*

It is evident from the scope of C. S. U. C. c. 73, that notwithstanding any marriage settlement, any separate personal property of any married woman acquired after marriage, and not coming under or being affected by such settlement, shall be subject to the provisions of the Act in the same manner as if no such settlement had been made, and as to such property the married woman shall be considered as having married without a settlement.

*W. Nesbitt*, and *F. C. Moffatt*, for the wife.

*C. L. Ferguson*, for the husband's creditors.

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[16TH FEBRUARY, 1887.]

ADAMSON v. ADAMSON.

*Writ of assistance—R. S. O. c. 66, s. 11.*

The application of R. S. O. c. 66 is not limited to purely common law actions pending in those Courts before the Judicature Act, but extends to all writs of execution; and a

writ of assistance in execution of a decree of the Court of Chancery for the recovery of land is a writ of execution within the meaning of s. 11 of that Act, and does not remain in force after one year from the teste, if unexecuted, unless renewed.

*J. Maclellan*, Q.C., for the plaintiff.

*Bain*, Q.C., for the Sheriff of Peel.

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[PROUDFOOT, J., 8TH JANUARY, 1887.]

BAIN v. MALCOLM.

*Will—Agreement giving effect to unexecuted will—Deficient estate—Retainer—Set-off.*

I. R. endorsed notes for the accommodation of J. R. The holders received out of the estate of J. R. after his death 60 cents in the dollar, leaving \$3,500 unpaid. B., the executor of I. R., paid this. I. R., who died 1st January, 1884, left all the residue of her estate, real and personal, to be equally divided share and share alike, between J. R., J. F., and J. B. Shortly before her death I. R. had another will prepared, but died without executing it. There was a residuary clause in this latter will of all her property, directing a division of it into four equal parts, one share of which was to be given to J. R.

On 4th January, 1884, all persons interested in the residuary devises in these two wills, signed a written agreement on the back of the unexecuted will that they accepted the distribution of the estate of I. R. provided for in the latter unexecuted will.

By his own will executed on 13th February, 1884, J. R. directed that the estate of I. R., "so far as I am interested therein," be divided according to the said agreement, signed by him on January 4th, 1884.

*Held* (1). That B., the executor of I. R., had a right to retain out of the residuary share of her estate, assigned by the will to J. R., the full balance due on the said accommodation notes, although J. R.'s estate was insolvent.

R. S. O. c. 107, s. 30, abolishing the right of retainer in case of a deficiency of assets does not affect the question.

(2). That the agreement of 4th January, 1884, was binding on J. R., and was binding on his executor, and could not be impeached by his creditors.

*Bruce, Q.C.*, for the plaintiff.

*Kittson*, for the defendant.

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[ROSE, J., 12TH FEBRUARY, 1887.]

### CALDER v. FRAID.

*Debtor and creditor—Indorser of note—Attacking fraudulent conveyance—Advance—Security—Acts respecting assignments for benefit of creditors, 1885 and 1886 (O.).*

An accommodation indorser of a promissory note is a creditor of the maker so as to entitle him to take proceedings to set aside a fraudulent conveyance, before paying the note.

Where such an indorser advances money to the maker to pay the note, the maker being insolvent, and the object being to secure the indorser against his liability, a chattel mortgage given by the maker to secure such advance is fraudulent and void as against creditors.

Money advanced on the promise of security, which is not given, does not come within any of the exceptions in the Acts respecting assignments for the benefit of creditors of 1885 and 1886 (O.), the security not being given for any "present actual *bona fide* advance of money" within the meaning of these Acts.

*W. Cassels, Q.C.*, and *MacAdam*, for the plaintiff.

*Moss, Q.C.*, and *T. Stewart*, for the defendant.

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### COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 21ST FEBRUARY, 1887.]

### HUNTINGTON v. ATTRILL.

*Action on foreign judgment—Staying proceedings—Appeal in foreign country.*

An action on a foreign judgment was stayed pending an appeal in the foreign state from the judgment sued on,



although no stay of execution upon the original judgment was imposed by the foreign court. Terms as to diligence in prosecuting the appeal and preservation of the defendant's property in Ontario in *statu quo* were annexed to the order.

*Kingsmill* and *H. Symons*, for the plaintiff.

*Robinson, Q. C.*, and *Aylesworth*, for the defendant.

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### IN CHAMBERS.

[BOYD, C., 14TH FEBRUARY, 1887.]

### WALLIS v. NEWTON.

*Discovery—Information for purpose of pleading—Examination of plaintiff.*

The plaintiff appealed from an order of the Master in Chambers allowing the defendant to examine the plaintiff for discovery before delivering his defence.

The plaintiff had agreed with one Keep to do the plumbing, etc., for six houses which Keep was building, and to take in payment for the work the most easterly of the houses, subject to a mortgage for \$2,000. This agreement was registered, and subsequent to the registration Keep conveyed the six houses to the defendant, and then left the Province. This action was brought to enforce the agreement with respect to the most easterly house. The defendant swore that owing to Keep's absence he was unable to say whether the plaintiff had fulfilled his contract or not, and he wished discovery before pleading in order that he might set up the fact.

*Masten*, for the appellant, contended that this case was different from *Boulton v. Blake*, 11 P. R. 196, and *Gordon v. Phillips*, 11 P. R. 540, inasmuch as in this case it was the examination of the plaintiff only that was sought, and that examination could be had in the ordinary course immediately after the delivery of the defence. The defendant could set up the defence that the plaintiff had not done the work on the

houses properly, just as well without examining the plaintiff, even if he was not familiar with all the facts. This extraordinary discovery should not be granted upon such slight grounds.

*S. R. Clark*, for the defendant, was not called on.

BOYD, C., dismissed the appeal with costs, saying that the very fact that the discovery sought could be obtained by putting in a defence formally, and amending it afterwards after examination, shewed that it could not harm the plaintiff to have the examination now. Under the Judicature Act it was necessary to set up the facts constituting the defence; the defendant here could not be familiar with them in the peculiar circumstances of the case, and it would be in the interest of justice to permit the examination.

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### *In re* GARDNER.

*Devolution of Estates Act, 1886—Official guardian—Infants.*

Where proceedings are about to be taken under the Devolution of Estates Act, 1886, for the sale of lands in which infants are interested, application should be made to the official guardian before any expenses are incurred by way of advertisement or otherwise. Although the administrator has the right to sell the real estate, the infants have the right to express their views, which they can do only in the way pointed out by the Act, viz., through the official guardian.

*A. G. Murray*, for the administrator.

*J. Hoskin, Q.C.*, for the infants.

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### COMSTOCK v. HARRIS.

*Discovery—Examination of foreign party—Appointment and subpoena—Conduct money—Convenience—Production of books—Staying action.*

When a party to an action who lives in a foreign country, comes within the jurisdiction, service upon him of an appointment and subpoena, as in the case of resident litigants, is sufficient to compel his attendance; and it lies upon the

party so served to object at the time to the payment for conduct money.

It is unreasonable that books in constant use in business, should be brought from without the jurisdiction for the purposes of an examination, unless the examiner in the course of the examination rules that they are necessary.

Upon failure of the plaintiff to attend for examination pursuant to subpoena and appointment served upon him, the action should not be stayed till he does attend ; it is sufficient to impose a stay for a definite time.

*Langton*, for the plaintiff.

*Holman*, for the defendant.

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### TEDFORD v. TEDFORD.

*Lis pendens—Vacating—Dismissing action.*

The defendant Willis applied to the Master in Chambers for an order dismissing the action as against him for default in furnishing security for costs and vacating the registry of a *lis pendens* against his lands.

The master held that a case had been made out for a dismissal, but not for vacating the *lis pendens*, and the order as drawn up and issued shewed that the latter part of the motion was refused.

Upon appeal,

BOYD, C., held that a simple order dismissing the action was sufficient to discharge a certificate of *lis pendens* ; it was not necessary for the order to go on to direct that the *lis pendens* should be vacated, nor was it necessary to refuse that part of the application, as it was practically granted. He directed that the order should be varied by confining it to a simple dismissal of the action.

*J. A. Paterson*, for the appellant.

*W. N. Miller, Q. C.*, for the respondent.

[THE MASTER IN CHAMBERS, 14TH FEBRUARY, 1887.]

McMILLAN v. COLWELL.

*Discovery—Particulars—Slander.*

Motion by defendant for particulars of the names of all the persons in whose presence the slanderous words, which were the subject of the action, were spoken.

*W. M. Douglas*, for the motion, cited *Roselle v. Buchanan*, 16 Q.B. D. 656; *Marriott v. Chamberlain*, 17 Q. B. D. 154.

*A. H. Marsh*, contra, contended that particulars of the name of some *one* person present when the words were spoken would be sufficient; citing *Thornton v. Capstock*, 9 P. R. 535-

THE MASTER IN CHAMBERS followed the English cases cited and ordered particulars of the names of *all* the persons present.

[15TH FEBRUARY, 1887.]

DOMINION S. & I. CO. v. KILROY.

*Interpleader—Order to produce—Locality—Motion for irregularity, grounds of.*

After delivery of an interpleader issue, a party may take out a præcipe order for production of documents by the opposite party.

Such order should issue and the record should be passed in the principal office of the Court in Toronto, as no locality is pointed out by the usual proceedings in interpleader.

A notice of motion to set aside a proceeding for irregularity should shew, or refer to affidavits shewing, what the irregularity is; and where a notice was deficient in this respect, the motion was dismissed, but without costs, as the ground of irregularity advanced on the return of the motion was well taken.

*J. R. Roaf*, for the plaintiffs.

*Aylesworth*, for the defendant.

[21ST FEBRUARY, 1887.]

## IRVING v. CLARK.

*Costs, security for—Joinder of plaintiffs—Order against one plaintiff.*

Where there were several plaintiffs, and at least one was in the jurisdiction, though all the others were out of it, security for costs would not under the former practice have been ordered; but the law as to the joinder of plaintiffs, which was the foundation of this rule, is now quite different under Rule 89, and several plaintiffs may now seek relief against the same defendants in cases where there is not the least trace of a joint interest in the plaintiffs, where the failure of one plaintiff will not affect the claim of any other plaintiff, and where by consequence the right and liability to costs in the plaintiffs is as much several as though those plaintiffs had each brought a separate action; and therefore one plaintiff is not now always liable to the defendant's costs as against all the plaintiffs, and the old rule as to security for costs no longer governs in all cases.

And where the action was brought on behalf of two plaintiffs, B. seeking to enforce a mechanic's lien against certain land, and I. seeking to set aside a sale of the same land and to be allowed to redeem, I. being insolvent and having no beneficial interest in the action but put forward by another; it was

*Held*, that the defendants were entitled to security for costs against I.

*Quære*, whether even under the former state of the law the defendants would not have been entitled to security for costs against a person put forward as I. was.

*Dewart*, for the plaintiff.

*S. R. Clark*, and *R. A. Dickson*, for the defendants.

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## NOVA SCOTIA.

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### In the Supreme Court.

#### REGINA v. HICKS.

*Canada Temperance Act, 1878—Irregularities in proceedings before proclamation and voting—Mandamus to Justices of the Peace.*

Application was made to the Court for a writ of mandamus to compel two Justices of the Peace for the county of Cumberland to issue a warrant against defendant for a violation of the Canada Temperance Act, 1878.

The Justices had declined to issue the warrant on the ground that the notice to the Secretary of State referred to in sections 5 and 6 of the Act, and required to be filed "in the office of the sheriff or registrar of deeds of or in the county," was not regularly filed, there being two registrars of deeds in the county of Cumberland—one at Amherst and one at Parrsboro—and the notice having been deposited only with the former, as a consequence of which the Justices considered that the subsequent proceedings were irregular, and that the Act was not in force in the county, although the proclamation had issued and the election had taken place and resulted in the adoption of the Act.

*Held*, that, as the effect of going behind the election would be to create difficulties and mischief, the language of the Act must be regarded as directory and not mandatory, and that the mandamus applied for must issue.

Per McDONALD, C. J., and RITCHIE, J. The Governor in Council being constituted the judicial authority to determine whether the preliminaries directed by the Act had been complied with, and having determined in the affirmative, and issued the proclamation, the regularity of the preliminary proceedings could not be questioned.

## UNION BANK v. FARNSWORTH.

*Promissory notes—Ratification of forged signature—Estoppel—Detriment and alteration of position.*

The defendant F. was sued as maker of two promissory notes, which purported to have been made by F. and endorsed by one G. who was joined as co-defendant. At the trial, F. swore that he had neither signed the notes in question nor authorized any one to sign them for him. The fact was admitted and was found in his favour, but it appeared that, previous to the trial, when payment of the notes was demanded, F. had stated that he had signed the notes for the accommodation of his co-defendant G., and made an offer of payment provided time was given, and that, in consequence of this admission, the plaintiffs refrained from taking any proceedings against G. for forgery.

*Held*, that F.'s conduct amounted to an adoption and ratification of the signatures to the notes, and that he was liable thereon.

Per WEATHERBE, J. The case, on the point of detriment or alteration of position, came within the cases of *Fitzrandolph v. Stanley*, and *Knights v. Whiffen*, and that on this point the plaintiffs were entitled to judgment.

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DICKIE v. WOODWORTH.

*Bail bond—Material alterations—Act requiring bond to be filed merely directory—Effect of alterations before delivery.*

In an action against defendants as sureties on a bail bond, the defence chiefly relied upon was that the bond was vitiated by material alterations made therein after its execution, and without the privity of defendants, by the erasure of the date mentioned for the appearance of the defendant, and the substitution of another date.

*Held*, on appeal, affirming the judgment of Ritchie, J., that the alleged alteration being noticed in the attestation clause, the burden was upon the defendants of showing that it was made subsequent to the execution of the bond, particularly

in view of the fact that defendants did not call as a witness their own counsel, who was an attesting witness to the bond and in a position to prove when the alteration, if any, was made.

Per RITCHIE, J., in the judgment appealed from. The clause of the statute requiring bail bonds to be filed is merely directory, and the failure to comply with it will not render the bond invalid. And also, assuming that the bond was altered after execution by making a change in the date at which the defendant was to appear, such an alteration, if made before the bond was delivered to the sheriff, and before it came into the custody of the plaintiffs, would not vitiate the bond or afford a defence to the action.

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### CREIGHTON v. SPINNEY.

*Verdict—Findings of jury—Amendment—New trial—Judicature Act, s. 21, s.-s. 8.*

The Judicature Act, s. 21, s.-s. 8, enacts that upon a trial by jury in certain cases, the Judge, "instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by the Judge for such purpose; \* \* and, on the finding of the jury upon the questions which they shall answer, the Judge shall enter the verdict," etc.

The plaintiff, as sheriff of the county of Lunenburg, levied upon a vessel on the stocks as the property of one McKeen, an absent or absconding debtor. The defendant after the levy took and disposed of the vessel, claiming under a bill of sale from McKeen executed before the attachment. The plaintiff thereupon brought trover for the conversion.

The evidence on the trial showed conclusively that the bill of sale was executed fraudulently; and, the jury having found all the questions of fact submitted to them in favour of the defendant, the Judge, disregarding their findings, entered a verdict for the plaintiff with costs.

*Held*, that the words of the Act, "on the findings of the jury," etc., mean consistently with such findings and not contrary to them.



No motion was made attacking the findings of the jury up to the close of the argument, when counsel for the plaintiff obtained leave to move for that purpose.

Counsel for the defendant at the same time moved to amend his rule by substituting the word "verdict" for the word "judgment," the latter word having been used instead of the former.

*Held*, that it was consistent with the spirit and intention of the Judicature Act and Rules that both amendments should be made, there being no surprise upon either party.

Both the verdict and the findings of the jury were set aside and a new trial ordered.

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*Re IVES, Ex parte CAMPBELL.*

*Promissory note—Renewal—Laches—Novation—Partnership—Parties in Court of Probate—Non-presentment—Pleading.*

The plaintiff deposited the sum of \$949.55 with the firm of W. I. & Son, on which interest was paid annually, and received as an acknowledgment the promissory note of the firm for the amount, dated July 1st, 1876, payable one month after date.

W. I. died in July, 1880, after which the business of the firm was continued by C. I., the surviving partner, who was also executor of the estate of the deceased.

In July, 1882, C. I. wrote in the name of the firm to the plaintiff enclosing the amount of interest then due on the note, and suggesting that, if the plaintiff concluded to allow the money to remain in their hands, he had better have the note renewed, as it would be running six years the following July, and there was some doubt whether or not the payment of interest would keep the note in force over six years.

In consequence of this the plaintiff delivered up the original note, and received in return a new note similar in all respects, except the date and a slight difference in the amount.

In February, 1884, C. I. failed in business, and plaintiff filed an attested claim against the estate of W. I., the

deceased partner, for the balance due him, four years having elapsed since the death of W. I.

*Held* (1). That plaintiff was entitled to claim against the estate of the deceased partner, notwithstanding the delay, the estate not having been settled in the meantime, and it not appearing that those interested has been in any way prejudiced.

(2). That, in the absence of proof of an express agreement to that effect, the facts and conduct of the parties would not warrant the inference that the plaintiff in taking the new note intended to discharge the estate of the deceased partner. There was no such introduction of a stranger into the contract or new term or condition incorporated into it as to create a novation.

(3). That the Court of Probate had jurisdiction to decide on the plaintiff's claim notwithstanding that the surviving partner was not made a party to the proceedings.

*Quære*, whether the surviving partner could be made a party to proceedings in his own right.

(4). That there was sufficient evidence to establish the claim without proof of presentation of the note at the place where the note was made payable; but, if that were necessary, and the executors wished to rely on such a defence, it should have been raised by an answer or counter allegation, which the practice of the Court of Probate allows.

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## GILLIS v. THE TOWN OF PICTOU.

*Municipal corporation—By-law—Expropriation of land—Ultra vires.*

C. 54, of the Acts of 1874, incorporating the town of Pictou, conferred upon the town council "power to control the making, maintaining, improving, and altering the roads, streets, etc., of the town; and the laying out of new ones if necessary," and also power to make by-laws touching all matters within their authority, but gave no express authority to expropriate land for street purposes, or to make by-laws in relation thereto. The Act of Incorporation gave the Council the same powers in reference to the expropriation of lands for street purposes as were formerly vested in the Sessions.

The town council passed a by-law for the expropriation of land required for street purposes, and proceeded under it to expropriate land of the plaintiff. The by-law provided for the appraisement of the land by the appraisers appointed by the town instead of by one appraiser appointed by the town, and one by the owner of the land, as under the law relating to the Sessions.

*Held, per* SMITH, WEATHERBE, and RITCHIE, JJ., that the by-law was *ultra vires* of the council.

McDonald, J., dissented.

*Per* RITCHIE, J. The making of by-laws for the expropriation of land is an extreme power and should not be held to be given by implication unless absolutely necessary to enable the council to perform the duties imposed upon them.

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### McBRIDE v. WARD.

*Bill of sale—Fraud—Affidavit of vendor—Creditors.*

In an action for the recovery of a horse the defendant relied on a bill of sale from J. A. W., a former owner.

The plaintiff who had purchased the horse, without actual notice of the bill of sale, from B., who purchased from J. A. W., relied on the fact that the bill of sale, when registered, was not accompanied by "an affidavit of the party giving the same, or his agent or attorney," as required by c. 84 of the Revised Statutes (4th series), as amended by c. 11 of the Acts of 1883.

The section of the Act requiring the affidavit contained no negative words, and was silent as to the effect of the want of the affidavit on the bill of sale.

*Held*, that the words of the Act were merely directory, and that even if the bill of sale was fraudulent, as was attempted to be shown, that would be of no avail to the plaintiff, who was not a creditor.

## ONTARIO.

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### Supreme Court of Judicature.

#### COURT OF APPEAL.

[1ST MARCH, 1887.

Q. B. DIVISION.]

#### SEYMOUR v. LYNCH.

*Indenture—Construction—Lease or License.*

An appeal from the judgment of the Queen's Bench Division, 7 O. R. 471, was dismissed, the members of this Court being divided in opinion.

*Per* HAGARTY, C.J.O., and BURTON, J.A., agreeing with PATTERSON, J.A., the Judge at the trial. The instrument in question was a mere license, and not a lease.

*Per* OSLER, J.A., and FERGUSON, J., affirming the Court below. It was a lease.

*Northrup*, for the appellant.

*Clute*, for the respondent.

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C. P. DIVISION.]

#### SCOTT v. CRERAR.

*Libel—Anonymous letter—Circumstantial evidence, rejection of.*

On the trial of an action for a libel contained in an anonymous letter circulated among members of the legal profession in the City of H., charging the plaintiff with unprofessional conduct, no direct evidence was given to shew that the defendant was the author of the letter, but the plaintiff relied upon several circumstances pointing to that conclusion. The trial Judge refused to admit some of the evidence tendered.

*Held*, reversing the judgment of the Court below, 11 O. R. 541, that evidence of the defendant being in the habit of

using certain peculiar or unusual expressions which occurred in the letter was improperly rejected ; but

*Semble*, a witness could not be asked his opinion as to the authorship of the letter ; and

*Per* BURTON, J.A. Evidence of literary style on which to found a comparison, if admissible at all, is not so otherwise than as expert evidence.

*McCarthy, Q.C., and Wallace Nesbitt, for the appellant.*

*Robertson, Q.C., for the respondent.*

### SUTHERLAND v. COX.

*Brokers—Agreement to carry stock on margin—Failure to purchase stock—Custom and usage.*

The judgment of the Court below, 6 O. R. 505, in favour of the plaintiff, was affirmed on appeal.

*Lash, Q.C., and W. Cassels, Q.C., for the appellants.*

*D. E. Thomson and D. Henderson, for the respondent.*

### CAIN v. JUNKIN.

*Crown grant—Description—Error—Evidence—Possession.*

The judgment of the Court below and the judgment of PATTERSON, J.A., at the trial, 6 O. R. 532, in favour of the plaintiff, were affirmed on appeal.

*McCarthy, Q.C., and Hudspeth, Q.C., for the appellants.*

*Moss, Q.C., and Poussette, Q.C., for the respondent.*

PROUDFOOT, J.]

REGINA *ex rel.* FELITZ v. HOWLAND.

*In re* O'BRIEN.

*Contempt of Court—Solicitor—Locus standi of applicant.*

The decision of PROUDFOOT, J., 11 O. R. 633, finding that the solicitor for the respondent in a *quo warranto* proceeding was in contempt on account of a letter written by him and

published in a newspaper commenting upon a decision of the Master in Chambers, and directing the solicitor to pay costs to the applicant, the relator in the proceeding, was affirmed.

*Per* BURTON, J.A., who dissented. As it appeared that the ground on which the application was based, viz., prejudice to the applicant's case, had ceased to exist at the time it was heard, the proper course would have been to dismiss it so far as the applicant was concerned. The matter then having been brought under the notice of the Court, it might on its own motion have punished the contempt shewn to its officer, even though the *quo warranto* proceedings were not still pending; but that course was not adopted; the learned Judge proceeded solely on the ground that the applicant had a *locus standi*, and gave him the costs of the application; and the appeal should therefore be allowed.

*S. H. Blake, Q.C., and Lefroy, for the appellant.*

*Bain, Q.C., and Kappeler, for the respondent.*

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C. C. CARLETON.]

### HOUSTON v. McLAREN.

*Landlord and tenant—Covenants in lease—Line fence.*

A lease from the defendant to the plaintiff under the Short Forms Act contained the usual covenant by the plaintiff, the lessee, to keep up fences, but the defendant, the lessor, undertook and agreed "to build the line fence between the premises hereby demised and the farm of D. M., should the same be required during the currency of the lease."

It appeared by the evidence that there was no line fence between the farms, but that there was a fence upon D. M.'s land about 24 yards north of the true boundary. The plaintiff alleged that this fence was out of repair, that the defendant would not mend it, and that in consequence damage had been done to his crops by cattle, and he contended that the condition "required during the currency of the lease" was fulfilled by the fence on D. M.'s land being out of repair.

*Held*, affirming the judgment of the Court below, that no liability could accrue under the defendant's covenant until something occurred to disturb the state of things exist-

ing at the time the lease was made, and that the covenant was designed to meet such a contingency as D. M. refusing to allow entry on his land to repair the fence, or requiring the line fence to be built.

*Semble*, per HAGARTY, C.J.O., that the plaintiff's covenant to keep up fences applied to all then existing fences used for the protection of the farm, and would be properly applicable to the fence on D. M.'s land, so long as it remained as it then was ; but

*Per* BURTON and PATTERSON, JJ.A. The plaintiff's covenant would only extend to fences on the demised premises.

*Allan Cassels*, for the appellant.

*Lash*, Q.C., for the respondent.

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### SEABROOK v. YOUNG.

*Title to land—County Court, jurisdiction of—Pleading—Rules 128, 146, 147, 148, 189, 240—R. S. O. c. 43, s. 28—Estoppel—Ejectment—Admissions.*

Under the system of pleading in the High Court and in County Courts under the Judicature Act, Rules 128, 146, 147, 148, 240, where a material fact is alleged in a pleading, and the pleading of the opposite party is silent with respect thereto, the fact must be considered as in issue.

And where, in an action of trespass for pulling down fences and for mesne profits, the plaintiff alleged his title at the time from which he claimed to recover the *mesne* profits, and the defendant in his statement of defence denied that he committed any of the wrongs in the plaintiff's statement of claim mentioned, and denied that he was liable in damages or otherwise on the alleged causes of action :

*Held*, that on these pleadings the title to land was expressly brought in question, and the jurisdiction of the County Court thus ousted.

The defendant was not estopped from raising the question of jurisdiction at the trial because of his omission to file an affidavit under R. S. O. c. 43, s. 28, that his pleading was not pleaded vexatiously, nor for the mere purpose of excluding jurisdiction ; such an omission was a mere irregularity for which the plea might have been set aside, but it could not

operate to confer jurisdiction where the plea raised the question of title.

The statement of claim presented a cause of action within the jurisdiction, and the defendant could not have demurred; it depended upon his pleading whether the jurisdiction would be ousted; and therefore Rule 189 did not apply to prevent the raising of the question of jurisdiction at the trial.

It was contended that the defendant was estopped from disputing the plaintiff's title by his admissions and by reason of the plaintiff having recovered a judgment in ejectment against the defendant's tenants; but the plaintiff's claim was for damages for pulling down fences, and for mesne profits for a period five or six months prior to the date of the ejectment, and the admissions of title did not go further back than the ejectment.

*Held*, that the judgment against his tenants was evidence against the defendant, but that the title was really in question and necessary to be proved in respect of the period for which mesne profits were claimed prior to the ejectment.

*Allan Cassels*, for the appellant.

*Read, Q.C.*, and *Sparks*, for the respondent.

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## High Court of Justice.

### QUEEN'S BENCH DIVISION.

[CAMERON, C.J., 11TH FEBRUARY, 1887.]

#### REGINA v. WALKER..

*Canada Temperance Act, 1878, ss. 108, 109, 111, 119—Conviction—Search warrant—Certiorari—Presumption that liquor kept for sale—Municipal By-law—Costs.*

An information charging the defendant with having sold intoxicating liquor was laid before two Justices of the Peace, and immediately afterwards a further information to obtain a search warrant was sworn by the same complainant before the same two Justices. Thereupon a warrant to search the premises of the defendant was issued under the hand and seal



of one only of the two Justices. Upon the search being made three bottles were found, each containing intoxicating liquor, and it was sworn that there were also found in the defendant's house other bottles, some decanters and glasses, and a bar or counter.

On the day following the search the complainant laid a new information before the same two Justices of the Peace, charging the defendant with keeping intoxicating liquor for sale. Upon the hearing, the constables who executed the search warrant were the only witnesses examined, and on their evidence the defendant was convicted.

Upon motion to quash the search warrant and conviction.

*Held*, that ss. 108 and 109 of the Act were intended to provide process *in rem* for the confiscation and destruction of liquor, in respect of which a use prohibited by the statute was being made, and not to provide a means of obtaining evidence on which to found a prosecution or to support one already initiated.

*Held*, also, that the warrant in this case was illegal because issued by one Justice of the Peace only.

*Held*, also, that the operation of s. 111 of the Act in taking away the right to *certiorari*, is confined to convictions made by the special officials named in the section.

*Held*, further, that the presumption of keeping liquor for sale, created by s. 119 of the Act, arises only where the appliances for sale of liquor mentioned in the section, together with the liquor, are found in municipalities in which a prohibitory by-law passed under the provisions of the Act is in force.

As it appeared that in this case the search warrant had been issued, and the defendant's premises searched for the mere purpose of possibly securing evidence upon which to bring a prosecution, the Justices of the Peace and the informant were ordered to pay the defendant's costs.

*Delamere*, for the Crown.

*Aylesworth*, for the defendant.

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[ROSE, J., 25TH FEBRUARY, 1887.]

REGINA v. FRENCH.

REGINA v. ROBERTSON.

*Canada Temperance Act, 1878—Adjournment—32 & 33 V. c. 31, s. 46—  
Quashing conviction—Consent.*

Where the Magistrate adjourned the hearing of a case under the Canada Temperance Act, 1878, for more than a week, contrary to 32 & 33 V. c. 31, s. 46, the conviction was quashed, but without costs.

*Semble*, the consent of the defendant to the adjournment, if proved, would not have given jurisdiction.

*Delamere*, for the Crown.

*W. H. P. Clement*, for the defendant.

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### COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 12TH MARCH, 1887.]

BETTS v. GRAND TRUNK RAILWAY CO.

*Discovery — Production of documents—Railway — Accident — Report and  
evidence on investigation—Privilege.*

The plaintiff in an action for damages for injuries to him in a railway accident, sought to compel the defendants to produce for inspection by him a certain report of an investigation held by the defendants immediately after the accident, and the memoranda of evidence taken at the investigation.

These documents, according to the evidence of H., an officer of the defendants, who was examined for discovery in the action, were not obtained for the solicitor of the defendants, nor for the purpose of being laid before him for advice, nor in view of any impending or threatened litigation, nor after litigation commenced, but “for the purpose of the management of the line”—“for our own purposes: it was not intended for a purpose of this kind” (*i.e.* for use in legal proceedings). In answer to the question whether the defendants’ solicitor was present at the investigation, H. said, “No; it would be entirely between the

officers of the Company." The affidavit of the solicitor stated that the information was obtained that he might advise the defendants as to their liability for damages arising from the accident, and that it had been used for such purpose and no other.

The defendants' affidavit of documents did not claim privilege for these documents, but denied the possession of any documents relating to the matters in question; but it was admitted that the affidavit of documents had been prepared under misapprehension of the facts, and that these documents were in the possession of the defendants.

*Held*, that the Court need not under the circumstances consider whether the examination of H. could be received to contradict the affidavit of documents, but should look at the matter as if the documents had been set out and privilege claimed for them in the affidavit; and that upon the statements of H. and of the solicitor, the documents were not privileged and should be produced.

*Wheeler v. Le Marchant*, 17 Ch. D. 675, and *Westinghouse v. Midland R. W. Co.*, 48 L. T. N. S. 462, followed.

*Aylesworth*, for the defendants.

*Shepley*, for the plaintiff.

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### McMAHON v. LAVERY.

*Jury notice—Legal and equitable issues—C. L. P. Act, ss. 257, 258.*

The plaintiffs sued as executors of McB. to recover from the defendant, a solicitor, moneys placed in his hands for investment, and certain notes and moneys received by him as solicitor and agent of McB., and prayed that the defendant might be ordered to assign certain securities in his hands. The defendant set up by way of defence a certain agreement under which he alleged that the plaintiffs were estopped from making their claim. The plaintiffs then amended their statement of claim, setting up fraud in the drawing of this agreement and in procuring the plaintiffs to execute it, and asked that it might be declared void and delivered up to be cancelled.

*Held*, that the case came within ss. 257 and 258 of the C. L. P. Act, and that the legal issues should be tried by a jury and the equitable issues by a Judge without a jury, unless the Judge at the trial in the exercise of his discretion chose to try the whole case without a jury; but that the defendant was not entitled as a matter of right to have the jury notice struck out.

*Temperance Colonization Society v. Evans*, post p. 161, followed.

*W. H. P. Clement*, for the defendant.

*Watson*, for the plaintiff.

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### DOBIE v. LEMON.

*Judgment by default—Setting aside—Security—Disposal of property—Interest.*

The plaintiff claimed \$923.13, balance of an account, and interest thereon, and, in default of an appearance, signed final judgment upon the special endorsement of his writ of summons for \$1,253.

The defendant moved to set aside the judgment, swearing that he had failed to enter an appearance owing to a misapprehension, denying in positive terms that he owed the plaintiff anything, and alleging that he at one time owed him \$250, but that it had been satisfied by the plaintiff taking one A. as his debtor instead of the defendant, and further that if the debt had not been satisfied by A., it was barred by the Statute of Limitations. No affidavit was filed on behalf of the plaintiff verifying the debt, and the arrangement as to substituting A. was not denied. A local Judge set aside the judgment, but only upon the terms of the defendant giving security for or paying into Court the sum of \$250.

*Held*, that if upon an application by the plaintiff, under Rule 80 or Rule 324, for leave to enter judgment, such a defence had been sworn to, and such circumstances had appeared, the application would not have been granted, and payment into Court or security would not have been exacted from the defendant as a condition of his being allowed to defend; there is no substantial difference between the case where a party seeks the right to defend before judgment

signed, and the case where the judgment has been signed on account of a slip or misapprehension, and the defendant makes out a case giving him the right to defend; and therefore terms should not have been imposed upon the defendant. The disposal by the defendant of his property liable to execution since the service of the writ of summons upon him was not a matter to disentitle him to relief that otherwise could not properly have been denied him.

*Runnacles v. Mesquita*, 1 Q. B. D. 418, followed.

*Semble*, if the defendant's statements were true the plaintiff would not have been entitled to interest on the amount of his claim, and the judgment would have been irregular.

*Aylesworth*, for the plaintiff.

*C. J. Holman*, for the defendant.

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## CHANCERY DIVISION.

[THE DIVISIONAL COURT, 8TH JANUARY, 1887.]

### *In re* MOOREHOUSE & LEAK.

*Mechanic's lien—R. S. O. c. 120—Master in Chambers, jurisdiction of—Directing issue—Time of filing lien.*

*Held*, affirming the decision of Ferguson, J., 6 C. L. T. 596, *sub nom.*, *In re Peak*, that the Master in Chambers has jurisdiction to entertain a motion under R. S. O. c. 120, s. 23, to annul the registry of a mechanic's lien where the amount in question is over \$200.

The question whether an issue should be directed to try a dispute arising on a motion to vacate a mechanic's lien rests in the discretion of the Judge.

The time within which a lien must be filed is not measured by the durations of deliveries under the contract between the material man and the contractor, but by the completion of the work by the contractor for the owners for whom he is working.

*J. B. Clarke*, for the owner.

*F. E. Hodgins*, for the lien-holder.

[5TH MARCH, 1887.]

## McGUIN v. F. RETTS.

*Receiver—Right of action—Amendment.*

The receiver is the proper person to get in the outstanding debts due to the person or corporation whom he represents, payment to him is a proper discharge of the debt, and where there is no dispute he alone should act in the premises; but if litigation is needed to recover an alleged debt, it must be prosecuted in the name of the person having title to recover at law.

The receiver is no more than an officer of the Court who becomes custodian of the assets when received, and has no right to sue in his own name for a debt; nor can that right be conferred upon him by an order, made without notice to the alleged debtor, authorizing him to sue in his own name. The usual practice is in proper cases to direct the action to be brought in the names of the creditors; if there is no person in whose name the action can be brought, it may be that there would be jurisdiction to direct the action to be in the name of the receiver; but apart from special circumstances there is no authority for giving permission to the receiver to sue in his own name in respect of a right of action which is vested in another.

The right of the receiver to bring actions against persons, not parties to the suit, for the collection of debts is subject to two restrictions; (1) the sanction of the Court must be previously obtained; and (2) the action must be brought in the name of the party in whom the legal right or title to the property to be recovered is vested.

But where by an *ex parte* order, made in the suit in which the plaintiff was appointed receiver, he was authorized to bring actions in his own name for the collection of debts due to a certain Grange, and pursuant thereto brought this action, it was

*Held*, that an amendment should be made, adding the name of the Grange as co-plaintiffs.

The receiver had sufficient interest to remain a co-plaintiff, because he represented the creditors, and had the right to

receive the moneys recovered for distribution among them ; and it was not necessary that security should be given for the costs of the added co-plaintiffs.

*Reeve, Q.C.*, for the plaintiffs.

*Moss, Q.C.*, for the defendant.

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### ANDREWS v. CITY OF LONDON.

*Costs, scale of—Event—Trial—Rule 511.—Set-off.*

The parties by consent allowed a verdict for the plaintiff for \$1 to be taken before the Judge at the assizes, to be altered according to the result of a reference agreed upon, and also agreed that costs should abide the event. The action was for damages for negligence, and the award was in favour of the plaintiff for \$85. A question having arisen as to the scale of costs ;

*Held*, following *Watson v. Garrett*, 3 P. R. 74, and *Hyde v. Beardsley*, 18 Q. B. D. 246, that "costs to abide the event" does not mean that the plaintiff, if successful, shall have full costs, no matter how small a sum he may have awarded to him ; it means no more than this, that he shall have such costs as under the statutes and rules of Court a plaintiff recovering the amount that he recovers by the event is entitled to.

*Held*, also, following *Cumberland v. Ridout*, 3 P. R. 14, that the final judgment by means of the reference was to be regarded as obtained without a trial, and the costs therefore depended on Rule 511. The amount awarded being *prima facie* within the competence of the County Court, costs would be on the scale of that Court only, unless the course indicated in Rule 511 being taken, the taxing officer should be satisfied that they ought to be on the higher scale.

There should be no set-off of costs ; such a result is not contemplated by Rule 511, and it is not a fair construction to incorporate with it the provisions of R. S. O. c. 50, s. 347 ; that section is restricted to a case where there is a trial.

*White v. Belfry*, 10 P. R. 64, commented upon.

*Shepley*, for the defendants.

*Aylesworth*, for the plaintiff.

## TEMPERANCE COLONIZATION SOCIETY v. EVANS.

*Jury notice—Money demand—Preliminary question—Severing issues—Rule  
256—Trial Judge—C. L. P. Act, s. 255.*

The order of Proudfoot, J., *ante* p. 45, striking out the jury notice was reversed and the jury notice restored.

*Held*, a proper case in which to exercise the power under Rule 256 of severing the action so as to have that part of it which is preliminary tried first, the defendants having a *prima facie* right to a jury (unless the Judge at the trial should dispense with one), as to the main matter in controversy, viz., the plaintiffs' demand for payment of instalments due under the scrip contract; while the other claim of the plaintiffs, viz., for a declaration of their right to specific performance of settlement duties, could be better tried without the intervention of a jury.

*Per* PROUDFOOT, J., who retained his former opinion. When it is perfectly clear that the issues are such that they cannot be properly tried by a jury, it is not only within the jurisdiction of the Court or a Judge before the trial, but it is their duty to strike out the jury notice. In many cases, where the alleged facts are not verified, as in *Conmee v. Canadian Pacific R. W. Co.*, 12 A. R. 762, it is probable that the Judge at the trial is the proper officer to apply to; but to say that in every case the application is to be made to him; to say that we have the power under the C. L. P. Act, s. 255, but we must not exercise it, is to abdicate the functions we are required by the legislature to discharge.

*Hoyles* and *A. D. Cameron*, for the defendants.

*Lount, Q.C.*, and *A. H. Marsh*, for the plaintiffs.

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## KNAPP v. KNAPP.

*Husband and wife—Interim alimony—Disbursements—Altered status of  
married women—Separate estate.*

The peculiar practice, as to costs and alimony in matrimonial causes, which has been adopted by the Courts in this country in actions of alimony, is founded on the old English



law which gave the whole personal property of the wife to the husband, and gave him also the whole income of her real estate; so that, in the absence of a settlement, she was absolutely penniless, and therefore the Ecclesiastical Court not only provided for the costs of the defence, but also gave her alimony *pendente lite*, so as to provide for her maintenance. The practice is founded on the presumption that the husband has everything and the wife nothing, but when the contrary appears the law and presumption are done away. The practice appears well settled that in applications for *interim* alimony the Court will consider the question of the wife's ability to maintain herself out of separate estate, or other sources of income, such as her earnings and allowances from her friends.

And where the wife had been living apart from her husband for five years, and had been supporting herself out of the rents of houses owned by her, and by taking boarders, and through assistance rendered by members of her family, the Court refused to order the husband to pay *interim* alimony, but directed that he should pay the prospective cash disbursements of the plaintiff's solicitors, upon their undertaking to account for the amount, and to refund if it was afterwards found to be excessive.

*Per* BOYD, C. The legislation respecting married women has not wrought any change in the law as to the payment of disbursements. It can only have that effect where the wife is actually in receipt of such independent and separate means of support as will enable her to live and pay the cost of litigation without alimentation pending the action for alimony.

*H. J. Scott, Q.C., for the defendant.*

*Holman, for the plaintiff.*

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[PROUDFOOT, J., 2ND FEBRUARY, 1887.]

### COMSTOCK v. HARRIS.

*British ship—Alien mortgagee—Imp. Stat. 17 & 18 V. c. 104.*

The mortgagee of a British ship is not a owner within the meaning of Imp. Stat. 17 & 18 V. c. 104, and there is no provision in that statute to prevent an alien being a mortgagee.

*J. MacLennan, Q.C., for the plaintiff.*

*Lash, Q.C., for the defendant.*

[23RD FEBRUARY, 1887.]

*In re* CANNON, OATES v. CANNON.

*Administration order—Effect in saving claims from being barred—Champertous agreement.*

After the decision in this case, *ante*, p. 64, and in November, 1886, the notes in question were handed back to H. & Co. On 30th November, 1886, H. & Co. obtained leave from the Master to come in and prove their claim. From this order M. E. C., the administratrix, now appealed on the ground that at the time of the order of administration being made H. & Co. were not the holders of the notes, and that before they came back into their hands they were barred by the Statute of Limitations, and that H. & Co. were bound by the above decision against the notes in O.'s hands.

*Held*, that the order of administration, which was made before the period allowed by the Statute of Limitations had expired, prevented the remedy on the notes being barred.

*Held*, also, that H. & Co. might assert their title to the notes and prove upon them notwithstanding the champertous agreement with O.

*McMichael*, Q.C., and *A. Hoskin*, Q.C., for the appeal.

*Arnoldi*, contra.

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WOODWARD v. McDONALD.

*Reference to arbitration—Scope of reference—Construction of agreement.*

By a consent judgment in an action between members of a certain association for the sale of lubricating oil it was provided that: "All matters which may hereafter come into dispute between the association or board of directors thereof, or any member or members . . . relative to the said agreement" (*i.e.* the original agreement of association), or any alleged breach or non-observance thereof, or of any of the rules or regulations made or to be made by the said Board thereunder, and all matters of complaint by any member or members against any other member or members in respect of the premises" should be referred to arbitration as therein specified.

Acting under the agreement the board had fixed a certain sum to be paid per gallon to the association by the parties thereto, on the sale of any lubricating oil.

A dispute now arose, on the motion of one of the members, as to whether the three cents per gallon were payable on sales made by one member of the association to another, and whether the rate was payable upon the proportion of distilled petroleum used in making axle grease.

*Held*, that these matters were properly within the scope of the arbitrator under the above clause in the judgment, though they amounted to a dispute upon the construction of the agreement and the rules made under it.

*Street, Q.C.*, for the plaintiffs.

*J. Magee*, for the defendant McDonald.

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[FERGUSON, J., 24TH JANUARY, 1887.]

### CITY OF LONDON v. CITIZENS INS. CO.

*Principal and surety — Guaranty — Separate contracts — Contribution — Discharge.*

Action on a guarantee policy of defendants' company whereby the honesty in office of B., the plaintiffs' chamberlain, had been guaranteed, who however had been guilty of large defalcations. It appeared that one D. had also given the plaintiffs a similar bond guaranteeing B.'s honesty in office. The defendants contended that the plaintiffs had released D. from liability under his bond, and that this operated as a release of themselves. The defendants did not contract jointly with D., nor did D. contract with them; they could not be considered as joint contractors or joint debtors.

*Held*, under these circumstances, that even if it were the case that D. had been wholly released by the plaintiffs, the defendants would not be discharged *in toto* from liability on their contract, but only to the extent of the right of contribution from D. which they had lost by D.'s release.

*Ward v. National Bank of New Zealand*, L. R. 8 App. Cas. 765, followed.

Soon after B.'s defalcations were discovered he died, and after his death his executrix handed over certain of his property to a trustee, who was also an officer of the plaintiffs, to realise and apply the moneys therefrom towards satisfying B.'s defalcations, but without indicating to what part of such defalcations it should be applied. The trustee applied it towards satisfaction of the earlier of B.'s liabilities, in respect to which the defendants were not liable, since by a condition of their policy they were not liable except for losses occurring within a year before notice of claim made to them.

*Held*, that the case was similar to a payment made by a debtor to a creditor without express appropriation, in which case the creditor could appropriate it; and the defendants had no right to complain of the appropriation made in this case.

*Held*, also, that the defendants should pay interest on the amount due from them from three months after the proofs of loss were delivered.

*W. R. Meredith, Q.C.*, for the plaintiffs.

*Rae*, for the defendants.

*W. Creelman*, for the Guarantee Company, added as parties to the action.

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[2ND MARCH, 1887.]

### MCGILLICUDDY v. MCCARTHY.

*Admissions in pleadings—Judgment—Court or Chambers—Rules 16, 86, 322.*

An action to recover the balance due the plaintiff from the defendant, who had acted as the plaintiff's agent in certain money transactions.

It appeared upon the pleadings that the only question involved was the amount due, and the plaintiff moved before a Judge in Court upon the pleadings, and obtained judgment referring to the Master to ascertain how much was due the plaintiff, and reserving further directions, etc. Upon this motion counsel for the plaintiff stated that it was made under Rules 16, 86, and 322. After the Master had made his report the action was heard on further directions and as to costs, and

FERGUSON, J., held that the original motion for judgment might and should have been made in Chambers, and directed that costs as of a Chambers motion only should be taxed.

*H. J. Scott, Q.C.*, for the plaintiff.

*C. J. Holman*, for the defendant.

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IN CHAMBERS.

[BOYD, C., 14TH MARCH, 1887.]

VIDAL v. ACCIDENT INSURANCE COMPANY OF  
NORTH AMERICA.

*Insurance—Accident—Discovery—Examination of witness before trial—Rules  
224, 285.*

An action upon an accident insurance policy payable to the personal representatives of the assured, who was accidentally drowned.

The action was brought by the widow and administratrix of the deceased. The defence raised was that the insurance had been effected by one H. T. Vidal, a brother of the deceased, who had no insurable interest in his life, merely as a speculation, and that the action had been brought for his benefit.

After issue the defendants moved under Rules 224 and 285 for an order to examine H. T. Vidal. The application was based on the facts set up in the defence.

*W. B. Raymond*, for the motion, cited *Murray v. Warner*,  
11 P. R. 440.

*Hoyles*, for the plaintiff.

THE MASTER IN CHAMBERS refused the motion, holding that the defendants were not entitled to examine H. T. Vidal merely to ascertain his knowledge of the circumstances under which the insurance was effected.

On appeal BOYD, C., affirmed the Master's decision.

[ROSE, J., 1ST MARCH, 1887.]

WRIGHT v. WRIGHT.

*Interlocutory costs—Staying proceedings—Trespass.*

Where the plaintiff is acting in good faith his action should not be stayed for non-payment of interlocutory costs; and an action of trespass is in that respect in no way different from any other.

*Stewart v. Sullivan*, 11 P. R. 529; 7 C. L. T. 15, followed.

*Beck*, for the plaintiff.

*W. H. P. Clement*, for the defendant.

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*In re* DOYLE v. HENDERSON.

*Order, rescission of—Power of Judge—Appeal.*

A motion made to the Master in Chambers on the 27th October, 1886, to rescind his own *ex parte* order of 13th October, 1886, allowing the executrix of the plaintiff to issue execution for the costs of a motion for prohibition, was referred to a Judge in Chambers. The motion was made after the order had been acted upon, execution having been issued and placed in the sheriff's hands.

*Held*, that neither the Master nor the Judge in Chambers to whom the motion was referred had power to rescind the order; and if the motion was to be treated as an appeal from the original order it was too late and could not be entertained.

*McNabb v. Oppenheimer*, 11 P. R. 223, followed.

*Stanior v. Evans*, W. N. Dec. 25, 1886, p. 210, considered.

*V. Mackenzie, Q.C.*, for the defendant.

*W. H. Blake*, for the plaintiff.

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*In re* THE WESTERN FAIR ASSOCIATION  
v. HUTCHINSON.

*Prohibition—Division Court—Corporation—Question of fact.*

Motion for prohibition to a Division Court on the ground that the Western Fair Association did not exist in fact or in

law, and could have no title to the grand stand in dispute, and therefore the Court had no jurisdiction to enforce the judgment in the suit.

*Held*, that the question of corporation or no corporation was one of fact, and that the decision thereon was not reviewable in prohibition.

*Aylesworth*, for the defendant.

*W. H. P. Clement*, for the plaintiff.

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[4TH MARCH, 1887.]

GREEY v. SMITH.

*Costs—Counsel fee or solicitor's charge.*

Upon a settlement of the action it was arranged between the parties that the defendants should pay the plaintiffs' costs less counsel fees.

Upon taxation the defendants urged that an item charged as "attendance at Chicago on defendants' commission \$20 *per diem*" was a charge for the attendance of counsel, but the taxing officer ruled that it was to be regarded as for a solicitor's attendance (the gentleman who attended being both barrister and solicitor), and allowed the \$20 *per diem*.

Upon appeal,

ROSE, J., affirmed the ruling of the taxing officer, upon the authority of *Gough v. Park*, 8 P. R. 492, which he applied to this case.

*H. D. Gamble*, for the plaintiffs.

*Bristol*, for the defendants.

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[8TH MARCH, 1887.]

CHICK v. TORONTO ELECTRIC LIGHT CO.

*Costs, scale of—Rule 218—Money paid into Court with defence.*

The plaintiff in an action in the High Court of Justice claimed \$296.14, the balance of an account of \$896 for rent and goods sold and delivered.

The defendants in their statement of defence admitted a liability of \$170.30, but claimed a credit of \$81.14, leaving a balance due of \$89.16, which they brought into Court with their defence.

The plaintiff served notice under Rule 218, accepting the amount paid in full of the claim, and proceeded to tax his costs. Upon taxation a question was raised as to the scale of costs.

*Held*, that the provision in Rule 218 that the plaintiff may tax his costs, does not give him costs according to any higher scale than if he had entered judgment for the sum which he received out of Court; the costs should, therefore, be on the County Court scale, as the whole amount of the account was over \$800 and the amount admitted by the defendant was \$170.30.

*Lefroy*, for the defendants.

*W. T. Allan*, for the plaintiff.

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[9TH MARCH, 1887.]

### MUNN v. McCONNELL.

#### *Sale of goods—Inspection of samples—Rule 398.*

An action by the vendor on a contract for the sale of butter. Seven sample tubs, part of the whole consignment, were, when action brought, in possession of the defendant, who refused to accept the balance as not being up to sample. The butter had been shipped from Montreal to the defendant at Toronto, and upon his refusal to accept it the plaintiff employed experts here to compare the samples with the subsequent shipment. The plaintiff alleged that the defendant had shown false samples to experts, and although the defendant refused to accept the main shipment, he claimed to hold the sample tubs as a separate purchase, and refused to give them up. The plaintiff thereupon brought from Montreal his shipper and the person through whom he bought the butter, and applied to the defendant to show them the alleged sample tubs, which the defendant refused to do.

*H. Cassels*, upon the plaintiff's affidavit alleging the above facts, applied *ex parte*, under Rule 398, for an order for inspec-



tion of the seven alleged sample tubs, and to authorise the plaintiff and his witnesses from Montreal to enter upon the defendant's lands and buildings to make observation of them.

ROSE, J., after conference with CAMERON, C.J., made the order as asked.

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[THE MASTER IN CHAMBERS, 9TH MARCH, 1887.

STEELE v. COUNTY OF YORK.

*Costs—Appeal—Staying proceedings—Solicitors' undertaking.*

The plaintiff having been non-suited at the trial, moved in the Divisional Court and had the non-suit set aside and a new trial ordered, with costs of the non-suit and motion to be paid by the defendants. The defendants, desiring to appeal from the Divisional Court to the Court of Appeal, paid into Court the usual amount of \$400 as security for the costs of appeal and also the amount of costs taxed to the plaintiff under the order of the Divisional Court.

A motion was now made on behalf of the defendants to stay the plaintiff from proceeding to trial under the order appealed from.

*Kerr, Macdonald, Davidson, and Paterson*, for the motion.

*Mulock, Tilt, Miller, and Crowther*, contra.

THE MASTER IN CHAMBERS made the order staying proceedings, and directed that the amount of costs taxed to the plaintiff should be paid to his solicitors upon their undertaking to refund it, if the event of the appeal should alter the disposition of costs: following *Kelly v. Imperial Loan Co.*, 10 P. R. 499.

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BANK OF COMMERCE v. JENNINGS.

*Master in Chambers, jurisdiction of—Judicature Act, s. 48—48 V. c. 13, s. 13.*

Motion by the plaintiffs to compel a reference of the matters of account in dispute to an officer of the Court, under Judicature Act, s. 48.

*Langton*, for the defendants, objected to the jurisdiction of the Master in Chambers to entertain such a motion, citing

*White v. Beemer*, 10 P. R. 531; *Union Loan & Savings Co. v. Boomer*, Ib. 630.

*George Bell*, for the plaintiffs, contended that under 48 V. c. 13, s. 13, passed since these decisions, the Master in Chambers had jurisdiction to entertain the motion.

THE MASTER IN CHAMBERS held that his powers in respect of this motion had not been enlarged by the statute cited, and enlarged the motion before a Judge.

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### Second Division Court, Perth.

[WOODS, Co.J., 31ST JANUARY, 1887.]

#### TOWNSHIP OF MCKILLOP v. TOWNSHIP OF LOGAN.

*Arbitrators' fees—Municipal Act, 1883, ss. 387, 401, 562—R. S. O. c. 64.*

An action for \$60, being one half the fees paid by the plaintiffs to arbitrators for an arbitration between the plaintiffs and defendants under the Municipal Act, 1883, 46 V. c. 18, s. 562. The arbitrators were the Warden of Huron, the Warden of Perth, and the County Judge of Huron.

The defence was that, as the section of the Act under which the arbitration was held, does not give the arbitrators power to charge fees they were not entitled to any.

The award directed the plaintiff and defendants to pay the costs of the reference and award, fixed at \$120, in equal moieties, and in case of one corporation paying the whole that the other should repay the half.

*Held* (1). That s. 401 of the Municipal Act, 1883, applied only to arbitrators appointed by the council under s. 387 *et seq.*, and not to arbitrators under s. 562, but R. S. O. c. 64 applies to arbitrators under s. 562, and alters the law as laid down in *Weaver v. Bull*, 10 C. P. 369.

(2). That if the arbitrators had no power over the costs, the Court could not enforce the award, although it was not moved against; but

(3). Although R. S. O. c. 64 does not authorize the arbitrators to apportion the costs, s. 12 gives them a right of action for their fees after taxation against all the parties to the reference jointly and severally, and the rule is that each party shall bear half the expenses of the award, which includes arbitrators' fees; and therefore the party who pays the whole has a right of action against the other for the half, subject to the exercise of the right of taxation under s. 6.

*Holmested*, for the plaintiffs.

*Palmer*, for the defendants.

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## NOVA SCOTIA.

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In the Supreme Court.

JOHNS v. BARBOUR.

*Amendment—Supplemental bill—Money paid under protest.*

The firm of Rogers and Son made a deed of land to a trustee for the benefit of creditors. Three or four days afterward the defendants obtained a judgment against the firm which they recorded so as to bind lands. The next or the following day an attachment issued under the Insolvent Act of 1875, by virtue of which the plaintiffs became assignees of the firm, and, as such assignees, took a conveyance of the lands in question from the trustee under the first deed.

The defendants being about to sell the lands under their judgment, the plaintiffs applied to the Court for an injunction to restrain them from so doing, but the injunction was refused on the ground that the title to the lands was in the plaintiffs under the conveyances, and that the defendants acquired no lien under their judgment (3 R. & G. 43).

The defendants having again proceeded to sell, the plaintiffs paid the amount of the judgment under protest, and applied to a Judge for leave to file a supplementary bill, praying that the defendants be decreed to return the money so paid.

*Held*, on appeal from an order allowing the amendment asked for ;

*Per* WEATHERBE, J., that the amendment should be allowed as the most direct method of testing the sole question between the parties and putting an end to litigation.

*Per* McDONALD, C.J., that the relief prayed for in the supplementary bill was rendered necessary by circumstances arising out of subsequent dealings with the subject-matter of the original suit, and, as the supplementary bill appeared to be necessary to place the parties properly before the Court, the order appealed from was rightly made.

*Per* RITCHIE, J., the amendment should be made, as clearly in furtherance of the original cause of action.

McDONALD, J., dissented on the ground that all the questions upon which the application to file the supplemental statement proposed depended had been fully adjudicated. Also that since the payment of the money defendants had signed a satisfaction piece and thereby released their lien.

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## THE MUNICIPALITY OF GUYSBORO v. THE MUNICIPALITY OF ST. MARY'S.

*Railway—Damages—Municipal corporation—Expropriation of lands—Construction of c. 70 R. S., 3rd series.*

Lands for stations and roadway for the Eastern Extension Railway were expropriated under certain provisions of c. 70 of the Revised Statutes, 3rd series, which were made applicable by c. 74 of the Acts of 1876.

C. 70 provided, among other things, for the expropriation of lands for railway purposes, and for compensation to the owners thereof, the amount payable for buildings destroyed, lands taken, etc., being made "a county charge."

S. 54 provided that the custos of the county should deliver to each party a certificate of the amount to which such party was entitled under the appraisement, which should authorize such party to receive the amount with interest, and which should be "a charge upon the county for all the moneys payable thereunder until fully discharged."

S. 55 provided that "the damages appraised and established . . . should be apportioned by the Sessions . . . amongst the townships, districts, and places in each county and district . . . and that the proportion of each township, district, and place should be assessed upon their inhabitants, and should be levied and collected and paid over on the same principle as county rates."

By c. 29 of the Acts of 1840, the defendant township of St. Mary's was set off out of the county of Guysboro as a separate and distinct sessional district, and, by c. 1 of the Acts of 1879, the district of St. Mary's and the remaining part of the county of Guysboro were placed under separate municipal councils, and were known as the Municipalities of Guysboro and St. Mary's.

The lands appropriated for the purposes of the Eastern Extension Railway lay wholly in the municipality of Guysboro, and the damages were appraised and paid to the proprietors of the lands taken by means of an assessment imposed by that municipality upon the ratepayers resident within it. Proceedings were then taken to collect from the municipality of St. Mary's a proportion of the damages so paid.

*Held*, that the inhabitants of the defendant municipality, by reason of their being inhabitants of the county of Guysboro, were liable to be assessed in common with the other inhabitants of the county for the payment of the damages, but that there was no liability to refund to the plaintiff municipality any portion of the amount advanced by that municipality.

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### FORSYTH v. LAWRENCE.

*Bill of exchange — Special indorsement — Transfer — Pleading — Set-off — Tender.*

A bill of exchange drawn by the Amherst Boot and Shoe Co. on the firm of D. & Co. was indorsed "Pay to the order of the Bank of Nova Scotia, Amherst," and, by the agent of the bank at Amherst, "Pay to the order of the Bank of Nova Scotia, Halifax, for collection." The bill was accepted by D. & Co., but was not paid, and was returned to Amherst. While the bill was still in the hands of the agency of the

bank there it was purchased by defendant and was handed over to him, but without any indorsement being made other than those already on the bill. Defendant being sued by plaintiff as assignee of D. & Co., who had become insolvent, for a balance of account due that firm, pleaded the bill by way of set-off, and tendered an amount as "the balance due the estate of D. & Co."

As to the plea of set-off the plaintiff joined issue without replying specially.

*Held*, per McDONALD, SMITH, and WEATHERBE, JJ., that the bill having been specially indorsed to the bank could not be transferred to the defendant except by indorsement.

Per McDONALD, C.J., and RITCHIE, J., that if plaintiff wished to deny the indorsement he should have replied specially, and that by merely joining issue he could not put defendant to proof of the indorsement.

*Semble*, per WEATHERBE and RITCHIE, JJ., McDONALD, C.J., concurring, that the tender made by defendant was bad.

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## NEW BRUNSWICK.

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### In the Supreme Court.

#### CONNACHER v. PARLEE.

*Contract for sale of goods—Statute of Frauds—Offer by letter to sell—Acceptance.*

Action for breach of agreement to sell two car loads of potatoes. Defendant, who lived at Restigouche, wrote to plaintiff at St. John, on the 10th April, stating that he could load one or two car loads of Early Rose potatoes, and one or two of Jacksons, and asking if plaintiff would take a couple of car loads of each kind, and how much he would give per barrel for them. Plaintiff answered this the next day,

stating the prices he would give for two car loads of each kind, and asking defendant to let him know in two or three days if he would accept the offer. On the 13th the defendant replied that he would have one car load of Early Rose ready to leave by train on the 15th and would send another car load of the same kind the next week; but that he could not get the Jacksons at the price named by plaintiff; and asking plaintiff to send him \$200. On the 15th defendant wrote to plaintiff that potatoes were coming in very slowly, that he could not get loaded before the middle of the next week, and that he would advise plaintiff when the potatoes were loaded. On the 22nd defendant wrote to plaintiff that a car load of potatoes had left that day, and that he would be in St. John on a day named (about the time of the arrival of the potatoes there.) Defendant went to St. John and told plaintiff that he had the car load of potatoes for him, and plaintiff offered to pay him for them, but defendant wished him to see the potatoes first, which he did, and approved of them, telling defendant to call at plaintiff's store and be paid. The next day the defendant refused to deliver the potatoes.

*Held*, per ALLEN, C.J., PALMER, KING, and FRASER, JJ. (WETMORE, J., dissenting). 1. That though the defendant's letter of the 13th April was not an acceptance of the plaintiff's offer of the 11th, it might be treated as a counter offer by defendant of two car loads of Early Rose potatoes, and if verbally accepted by plaintiff created a binding contract. 2. That the agreement by plaintiff to accept the car load that had arrived and to pay for them, was an acceptance of the defendant's offer of the 13th April of two car loads of Early Rose, and created a contract for that quantity.

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### APPLEBY v. BLACK.

*Mortgagee of ship—Agreement not to charter without consent of mortgagor—Notice of charter by telegram—Construction of port of loading—Acquiescence by mortgagor.*

Plaintiff, the managing owner of a vessel, residing in this Province, mortgaged her to defendant, a broker in England, who covenanted that if the vessel should be consigned to

him, he would not charter her without the plaintiff's consent. Afterwards, while the vessel was on a voyage to King's Lynn, in England, the plaintiff wrote to defendant, telling him if he had not already chartered the vessel, not to do so, but to send her in ballast to Sydney, C. B., for coal. On the 29th of May, 1880, a few days after the receipt of this letter, the defendant agreed to charter her to carry a load of coal from North Shields in England, to Salem, Massachusetts; but in consequence of the master refusing to sign the charter-party unless the plaintiff was communicated with, the defendant telegraphed to the plaintiff as follows:—"Fixed Kersten (vessel's name) coal—Salem, 12/—offered 67/6, dry deals, Saguenay to St. Malo," to which plaintiff answered by telegraph, "Take coals, don't take deals." Immediately on receipt of this the charter-party was signed, and the vessel proceeded to Shields, about 170 miles from King's Lynn, took in cargo, and sailed for Salem about the end of June, and early in July ran ashore and was injured. She was got off and repaired, sailed again, and arrived at Salem. The plaintiff received a copy of the charter-party from the defendant on the 20th June, which was the first knowledge he had that the vessel had gone to Shields to load, but he made no objection on that account, and when he was afterwards, in July, informed of the damage to the vessel, he requested the defendant to do the best for his (plaintiff's) interest, in looking after the repairs, insurance, etc. The defendant continued to act as the plaintiff's agent in reference to the vessel and other matter for about two years after this, making advances to the plaintiff, without any complaint by him of the vessel having been sent to Shields until the defendant pressed for payment of the amount due him, when the plaintiff brought this action for breach of agreement.

*Held, per WETMORE, PALMER, and FRASER, JJ.* 1. That the telegrams did not necessarily mean that the vessel should load at King's Lynn, but authorized the defendant to charter her to load at any port where a prudent merchant would send a vessel for such purpose.

2. That as by the telegrams it could not be known what port of loading was intended, that must be ascertained by extrinsic evidence, and the Court had a right to look to what was written and done by the parties after the telegrams were



sent, to assist in interpreting them, and to show what port of loading was intended.

3. That the plaintiff by his conduct and dealings with defendant after knowing that the vessel had been chartered to load at Shields, and not making any objection, was estopped from saying that the defendant had not put the proper interpretation on the telegrams.

Per KING, J. 1. That the meaning of the telegrams was that the vessel was to load at King's Lynn, where she then was; or, if that was not a coal shipping port, from such a port reasonably near; and according to the construction of the telegrams there was a breach of covenant by defendant in chartering the vessel without the plaintiff's consent.

2. But that the plaintiff's conduct after knowing of the charter and not making any objection, had ratified the defendant's act, or treated it as an immaterial variance from his instructions.

3. That the word "Fixed" in defendant's telegram implied a completed transaction; but the defendant's telegram and the plaintiff's answer shewed that that was not the meaning intended, and that it was conditional on the plaintiff's assent.

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## MANITOBA

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In the Queen's Bench.

[IN APPEAL.]

THE EASTERN JUDICIAL DISTRICT BOARD v.  
THE CITY OF WINNIPEG.

*Judicial District Boards—Equalized assessment—Discretion.*

*Held*, reversing the judgment of TAYLOR, J., 3 Man. L. R. 537, 6 C. L. T. 503, that Judicial District Boards, in apportioning among the municipalities the amounts necessary for the purposes of the Boards, have no discretion as to whether the equalized assessment shall be of the real and personal estate, or of the real estate alone. It must be upon the basis of both real and personal estate.

## McDONALD v. DEACON.

*Writ of summons—Special indorsement—Affidavit of service.*

An affidavit of service stated that the deponent had served defendant with a copy of the writ of summons annexed to the affidavit, upon which, as also upon the copy served, was indorsed "a notice of the name and residence of the attorney by whom the said writ was issued, and English notice of claim, particulars of claim, and notice in case of non-appearance of said defendant according to the statute in that case made and provided." The writ annexed to the affidavit was specially indorsed.

*Held*, that there was sufficient proof that the copy served was also specially endorsed.

[FULL COURT.]

## PAISLEY v. BANNATYNE.

*Principal and agent—Power of agent appointed to receive money.*

B., one of three executors, the defendants, agreed to permit the plaintiff to become assignee of a lease granted by their testator; to allow him to deduct from the rent the value of improvements to be placed by him upon the premises to the amount of \$1,000; and that the rent should be increased by 13 per cent. of the amount of such allowances.

The improvements were made, but the value was not deducted out of the rent.

In an action against the defendants, personally and not as executors, a verdict was given for plaintiff.

*Held*, 1. That there being no proof of a joint promise the verdict was wrong except as to B.

2. That the receipt of rent by B., only showed that he had power to receive the rent in money.

3. That an agent authorized to collect a debt can receive it in money only.

[WALLBRIDGE, C.J.]

## REGINA v. BLACKSTONE.

*Forgery—False entries.*

Forgery is the falsely making or altering a document to the prejudice of another, by making it appear as the document of

that person. A simple lie, reduced to writing, is not necessarily forgery.

Consequently where a bank clerk made certain false entries in the bank books under his control, for the purpose of enabling him to obtain money of the bank improperly,

*Held*, that he was not guilty of forgery.

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[TAYLOR, J.]

*In re* ASSINIBOIA ELECTION.

*Justification by surety—Cross-examination—Refusing to answer questions.*

Upon the examination as to his solvency of a surety upon a bond for security of costs,

*Held*, 1. The surety cannot be compelled to produce his title deeds.

2. The examining party has no right to enquire as to all the property which the surety may own. The surety may say "I own a certain property, and I claim that to be of sufficient value to qualify me to be a surety."

3. The surety will not be committed because he gives unsatisfactory answers, as that he cannot remember the description of his lands. This is not a refusal to answer.

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MORRIS v. ARMIT.

*Costs—Taxation—Supplementary material on motion—Counsel fees—Brief.*

1. Where the material upon which a party is moving is defective, and he is allowed to amend or supply what is wanting, he cannot tax the costs of doing so.

2. The discretion of the taxing officer as to the amount of counsel fees not interfered with.

3. A second term brief allowed at the amount for which a second copy of the evidence could have been got from the shorthand writer.

4. Where the defendant succeeds on part of the issues but the plaintiff obtains a verdict, the defendant is entitled only to such costs as are exclusively applicable to the issues on which he succeeds.

## Supreme Court of Canada.

ONTARIO.]

[1ST MARCH, 1887.]

### BALL v. THE CROMPTON CORSET CO.

*Patent—Infringement of—Mechanical Equivalent—Substitution of one material for another—Want of invention.*

In a suit for the infringement of a patent the alleged invention was the substitution in the manufacture of corsets of coiled wire springs arranged in groups, and in continuous lengths for India rubber springs previously used. The advantage claimed by the substitution was that the metal was more durable, and was free from the inconvenience arising from the use of India rubber caused from the heat from the wearer's body.

*Held*, affirming the judgment of the Court of Appeal for Ontario, 12 A. R. 738, Fournier and Henry, JJ., dissenting, that this was merely the substitution of one well-known material, metal, for another equally well-known material, India rubber, to produce the same result, on the same principle in a more agreeable and useful manner, or a mere mechanical equivalent for the use of India rubber, and it was consequently void of invention and not the subject of a patent.

*W. Cassels, Q.C., and Akers, for the appellants.*

*J. MacLennan, Q.C., and Osler, Q.C., for the respondents.*

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[14TH MARCH, 1887.]

### WHITING v. HOVEY.

*Company—Directors of—Assignment of property by, for benefit of creditors—Ultra vires—Change of possession—R. S. O. c. 119—Description of property assigned.*

An assignment by the directors of a Joint Stock Company of all the estate and property of the company to trustees for the benefit of the creditors of the company, is not *ultra vires* of such directors, and does not require special statutory authority or the formal assent of the whole body of shareholders.

*Quære.* Is such an assignment within the provisions of the Chattel Mortgage Act of Ontario, R. S. O. c. 119?

Where such an assignment was made, and the property was formally handed over by the directors to the trustees, who took possession and subsequently advertised and sold the property under the deed of assignment,

*Held*, that if the assignment did come within the terms of the Act, its provisions were fully complied with; the deed being duly registered, and there being an actual and continued change of possession as required by s. 5.

In such deed of assignment the property was described as "All the real estate, lands, tenements, and hereditaments of the said debtors (company) whatsoever and wheresoever, of or to which they are now seised or entitled, or of or to which they may have any estate, right, title, or interest of any kind or description with the appurtenances, the particulars of which are more particularly set out in the schedule hereto, and all and singular the personal estate and effects, stock-in-trade, goods, chattels, right, and credits, fixtures, book debts, notes, accounts, books of account, choses in action, and all other the personal estate and effects whatsoever and wheresoever, etc."

The schedule annexed specifically designated the real estate, and included the foundry, erections, and buildings thereon erected, and including all articles such as engines, etc., in or upon said premises.

*Held*, that this was a sufficient description of the property intended to be conveyed to satisfy s. 23 of R. S. O. c. 119.

*McCall v. Wolff*, May 12th, 1885, unreported, approved and followed.

*Robinson, Q.C.*, and *W. M. Hall*, for the appellants.

*McMichael, Q.C.*, and *S. H. Blake, Q.C.*, and *H. McK. Wilson, Q.C.*, for the respondents.

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### *In re* UNION FIRE INSURANCE COMPANY. SHOOLBRED'S CASE.

*Company—Winding-up Act—45 V. c. 23 (D.)—Appointment of liquidator—  
Notice of appointment under s. 24.*

It is a substantial objection to a winding-up order, appointing a liquidator to the estate of an insolvent company under

45 V. c. 23, that such order has been made without notice to the creditors, contributories, shareholders, or members of the company, as required by s. 24 of the Act, and an order so made was set aside, and the petition therefor referred back to the Judge to be dealt with anew.

*Per Gwynne, J.*, dissenting. Such an objection is purely technical and unsubstantial, and should not be allowed to form the subject of an appeal to this Court.

*W. Cassels, Q.C.*, and *W. H. Walker*, for the appellants.  
*Bain, Q.C.*, for the respondents.

QUEBEC.]

### BLACK v. WHEELER.

*Actio confessoria servitutis—Building of barn over alley subject to right of access to drain—Aggravation—Art. 557, C. C.*

By deed dated 22nd August, 1843, P. D. sold to one J. B. a certain property in the town of St. John, P.Q., with the right of draining the cellar or cellars of the said property, "by making and passing a good drain through the lots the said Pierre Dubeau has and possesses . . . and beneath the alley now left open, . . . and between the several houses belonging to the said Pierre Dubeau," and the deed of sale establishing the servitude was duly registered by a memorial thereof, 6th October, 1843.

The respondents having subsequently acquired the property, by their present action against the appellants, owners of the servient land, prayed that the said appellants' property be declared to have been and to be still subject to said servitude, and that the appellants be ordered to demolish a portion of a large barn constructed by them over said drain, which, they claimed, tended to diminish the use of the servitude and to render its exercise more inconvenient. The appellants, on the present appeal, contended that, inasmuch as the barn was built on wooden posts, there was no solid floor in the barn, and the drain could be raised up and repaired just as well, if not better, as outside of the barn, there was no change of condition of the servient land contrary to law.

*Held*, that on the evidence the building of the barn in question aggravated the condition of the premises, and therefore that the judgment of the Court below ordering the appellants to demolish a portion of their barn covering the said drain, in order to allow the respondents to repair the drain as easily as they might have done in 1843 when said drain was not covered, and to pay \$50 damages, should be affirmed.

Gwynne, J., was of opinion that all the appellants were entitled to was a declaration of right to free access to the land in question for the purpose of making all necessary repairs in the drain as occasion may require, without any impediment or obstruction to their so doing being caused by the barn which had been erected over the drain, and that the action for damages was premature.

*Robertson, Q.C.*, for the appellants.

*Geoffrion*, for the respondents.

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### L'ASSOCIATION PHARMACEUTIQUE DE LA PROVINCE DE QUEBEC v. BRUNET.

*Quebec Pharmacy Act, 48 V. c. 36, s. 8, (Q.)—Construction of—Partnership contrary to law—Mandamus.*

*Held*, affirming the judgment of the Court below, that s. 8 of 48 V. c. 36 (Q.), which says that all persons who, during five years before the coming into force of the Act, were practising as chemists and druggists in partnership with any other person so practising, are entitled to be registered as licentiates of pharmacy, applied to the respondent, who had, during more than five years before the coming into force of the said Act, practised as chemist and druggist in partnership with his brother and in his brother's name, and therefore he, the respondent, was entitled under s. 8 to be registered as a licentiate of pharmacy.

*Archambault*, for the appellants.

*Geoffrion*, for the respondent.

## THE CORPORATION OF THE PARISH OF ST. CESAIRE v. MACFARLANE.

*Municipal debentures—Future conditions—Municipal code, art. 982.*

*Held*, that a debenture being a negotiable instrument, a railway company that has complied with all the conditions precedent stated in the by-law to the issuing and delivery of debentures granted by a municipality is entitled to said debentures, free from any declaration on their face of conditions mentioned in the by-law, to be performed in future, such as the future keeping up of the road. Art. 982 (Mun. Code). Fournier, J., dissenting.

*Geoffrion*, for the appellants.

*O'Halloran, Q.C.*, for the respondent.

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## FAIRBANKS v. BARLOW.

*Pledge without delivery—Possession—Rights of creditors.*

B., who was the principal owner of the South Eastern Railway Company, was in the habit of mingling the moneys of the company with his own. He bought locomotives which were delivered to and used openly and publicly by the Railway Company as their own property for several years. In January and May, 1883, B. by documents *sous seing prive* sold ten of these locomotive engines to F. *et al.*, the appellants, to guarantee them against an indorsement of his notes for \$50,000. B. having become insolvent, F. *et al.*, by their action directed against B., The South Eastern Railway Company, and R. *et al.*, trustees of the company under 43 & 44 V. c. 49, asked for the delivery of the locomotives, which were at the time in the open possession of the South Eastern Railway Company, unless the defendants paid the amount of their debt. B. did not plead. The South Eastern Railway Company and R. *et al.*, as trustees, pleaded a general denial, and during the proceedings O'H. filed an intervention alleging he was a judgment creditor of B., notoriously insolvent at the time of making the agreement.

*Held*, affirming the judgments of the Courts below, that as the transaction with B. only amounted to a pledge not accom-



panied by delivery, *F. et al.*, the appellants, were not entitled to the possession of the locomotives as against creditors of the company, and that, in any case, they were not entitled to the property as against O'H., a judgment creditor of B., an insolvent. The action was therefore rightly dismissed and intervention maintained.

*Church, Q.C.*, and *Nicolls*, for the appellants.

*O'Halloran, Q.C.*, for the respondents.

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P. E. ISLAND.]

### SHERREN v. PEARSON.

*Statute of Limitations—Title to land—Possession for twenty years—Isolated acts of trespass, not sufficient to oust owner.*

In an action of ejectment the defence was that the land in question was a part of the defendant's lot, and if not that the defendant had had possession of it for over twenty years, and the plaintiff's title was consequently barred by the Statute of Limitations. In support of the latter contention evidence was given of cutting lumber by the defendant and those through whom he claimed on the land, but these alleged acts of possession only extended back some seventeen years with one exception, which was in the case of an uncle of the defendant who swore that he had cut every year for thirty-five years. The defendant, however, swore that this uncle had nothing to do with the land. The jury found for the plaintiff.

*Held*, affirming the judgment of the Supreme Court of Prince Edward Island, that these acts of cutting lumber were nothing more than isolated acts of trespass on wilderness land which could not effect an ouster of the true owner, and give the defendants a title under the Statute of Limitations.

*Hodgson, Q.C.*, for the appellants.

*Davies, Q.C.*, for the respondents.

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## ONTARIO.

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### Supreme Court of Judicature.

#### COURT OF APPEAL.

Q. B. DIVISION.]

[23RD DECEMBER, 1886.

#### MILLER v. CONFEDERATION LIFE ASSURANCE COMPANY.

*Life insurance—Warranty of answers of insured—Misstatements and suppression—New trial—Discovery of fresh evidence.*

The refusal of the Court below to order a new trial by reason of disagreement of the Judges, 11 O. R. 120, was affirmed, Hagarty, C.J.O., *hesitante* as to granting a new trial on the ground of the discovery of fresh evidence.

*S. H. Blake, Q.C., and Allan Cassels, for the appellants.*

*McMichael, Q.C., and McCarthy, Q.C., for the respondents.*

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[22ND MARCH, 1887.

#### In re KNIGHT v. THE TOWNSHIPS OF MEDORA AND WOOD.

*Prohibition—Division Court—Title to land—Notice disputing jurisdiction—  
48 V. c. 14, s. 1, 43 V. c. 8, s. 14.*

The judgment of the Court below, 11 O. R. 138, refusing to order prohibition to a Division Court, was affirmed on appeal, on the ground that the title to land did not come in question; but

*Held, per PATTERSON and OSLER, JJ. A.,* disagreeing with the Court below, and approving *Re Mead v. Creary*, 8 P. R. 374, 32 C. P. 1, that the notice under 48 V. c. 14, s. 1, amending 43 v. c. 8, s. 14, disputing the jurisdiction, is only required when a suit otherwise of the proper competence of the Division Court has been brought in the wrong division, and the want of such notice cannot give the Division Court jurisdiction if the title to land is brought in question.

*McCarthy, Q.C., and Pepler, for the appellants.*

*Arnoldi, for the respondent.*

C. P. DIVISION.]

[1ST MARCH, 1887.]

## DICKY v. McCAUL.

*Conversion—Sale of goods—Possession—Title—Receiver.*

*Held*, reversing the judgment of the Court below, that the defendant could not be adjudged guilty of a conversion of the goods in question by reason of his having joined in a bill of sale of them, and accepted and assigned a mortgage for the balance of the purchase money, no other act of interference with them on his part having been shewn, they never having been in his possession or control, and he never having had the power to deliver up or retain them so as to make a demand upon him and refusal by him evidence of conversion, and he having acted in the sale of the goods only as the agent and by the authority of another.

The plaintiff J. I. D. could not maintain an action for the conversion of the property in question, for, assuming that it was the property of those under whom he claimed, which was one of the matters in controversy, it did not become vested in him till after the alleged conversion.

Nor could the plaintiff J. D. maintain the action, he never having had the actual possession of the property, but a mere right, as receiver appointed by the Court, to obtain the custody of it if it belonged to those whom he represented, which would not support the action, though it might form the ground of a special application to the Court for a *mandamus*, or attachment, or other appropriate relief.

*Moss, Q.C., and Falconbridge, Q.C., for the appellant.*

*W. Cassels, Q.C., for the respondents.*

[22ND MARCH, 1887.]

## GRAY v. THE CORPORATION OF THE TOWN OF DUNDAS.

*Municipal Corporation—Sewer connecting with creek—Fouling stream—Riparian proprietor.*

The judgment of the Court below, 11 O. R. 317, was affirmed on appeal.

*Lount, Q.C., for the appellants.*

*Osler, Q.C., for the respondents.*

Boyd, C.]

[8TH NOVEMBER, 1886.

## MITCHELL v. GORMLEY.

*Partnership—Dealing with individual share—Sale of land.*

The plaintiff and defendant jointly purchased certain land with the object of selling it again at a profit, the plaintiff having an undivided one-third interest, and the defendant the remaining two-thirds.

The defendant formed a syndicate of eight persons, of whom he himself was one, to which he turned over his two-thirds undivided interest at a profit. There was no agreement between the plaintiff and defendant restraining either of them from disposing of his share.

*Held*, affirming the judgment of Boyd, C., 9 O. R. 139, that, assuming the plaintiff and defendant to have been partners as dealers in real estate bought on speculation, to be sold again at a profit, no part of the partnership property had been alienated or taken away from the purposes of the partnership, and therefore the plaintiff was not entitled to participate in the profit made by the defendant on the sale of his undivided share.

*McCarthy, Q.C., and Ritchie, Q.C., for the appellant.*

*S. H. Blake, Q.C., for the respondent.*

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High Court of Justice.

## QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 11TH MARCH, 1887.]

## McMULLEN v. POLLEY.

*Mortgagor and mortgagee—Authority of solicitor to receive mortgage money.*

M. applied to a solicitor for a loan of \$6,200 on his land, and the solicitor got P. to advance the money. The solicitor then drew the mortgage, which was executed by M. and his wife, and left with the solicitor until P. came to pay the money. P. subsequently called on the solicitor, and upon

his registering and delivering over the mortgage paid him the money. The solicitor after this told M., when he called on the 6th March, that P. had not been able as yet to get the money, but on M. stating that he needed \$400 at once, the solicitor gave him his own cheque for that sum. M. swore that this was as a loan and was subsequently repaid. On the 2nd April the solicitor absconded without having accounted for the mortgage money. After he left two receipts were found among his papers signed by M. and dated 6th March, for \$400, and \$89.36 as money received from the solicitor on account of the P. mortgage, and a memorandum from which it appeared that \$205.55 had been paid out of the mortgage money by the solicitor to discharge execution debts of M., which he had instructed the solicitor to settle.

*Held*, varying the judgment of PROUDFOOT, J., 12 O. R. 702, that to justify P. in paying the money to the solicitor, it should have been shewn that either express or implied authority was given the solicitor by M. to receive the money; that his possession of the mortgage with an indorsed receipt did not give such authority, but that there was evidence of authority to receive to his own use out of the mortgage money when paid the above three sums, sufficient to entitle P. to hold the mortgage as a security to that extent.

*Britton, Q.C.*, for the defendaut.

*Walkem, Q.C.*, for the plaintiff.

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## JORDAN v. DUNN.

*Will, construction of—Conditions precedent and subsequent, validity of.*

Testator, after granting to his wife a life estate in certain land, devised the same to his son, subject to the following conditions:

First, that he abstain totally from intoxicating liquors and card-playing.

Second, that he be kind and obedient to his mother.

Third, that he be known among his friends as an industrious man ten years after the death of his mother.

*Held*, 1. That the three conditions were conditions precedent up to the time of the mother's death, and that condi-

tions one and three were conditions subsequent for ten years after the mother's death.

2. That either the use of intoxicating liquors or the playing of cards would be a breach of the first condition.

3. That the first condition was not valid, and was too vague or indefinite for trial or adjudication by the Court ; and having been broken the son's title failed in so far as the condition was precedent, and was forfeited in so far as the condition was subsequent.

*Semble*, that conditions two and three were valid, and not too vague or indefinite for trial or adjudication by the Court.

*Lash*, Q.C., and *R. S. Cassels*, for the defendant.

*Osler*, Q.C., for the plaintiff.

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## REGINA v. PIERCE.

*Criminal law — Conviction for bigamy.*

The prisoner was convicted under 32 & 33 V. c. 20, s. 58, of bigamy. The first marriage was contracted in Toronto, the second in Detroit, in the United States of America.

*Held*, that it was incumbent on the Crown to charge and prove that the prisoner at the time of the commission of the offence was a subject of Her Majesty resident in Canada, and that he had left Canada with intent to commit the offence.

The trial Judge directed the jury that if the prisoner was married to his first wife in Toronto, and to the second in Detroit, they should find him guilty of bigamy.

*Held*, a misdirection.

The Judge withdrew from the jury the question of leaving with intent.

*Held*, also, a misdirection.

*Per* WILSON, C.J. The indictment did not sufficiently charge the offence ; and *quære* whether the trial should not have been declared a nullity.

*E. F. B. Johnston*, for the Crown.

*Bigelow*, for the prisoner.

## McCLARY v. JACKSON.

*Lessor and lessee—Covenant by lessor to pay for buildings.*

*Held*, that a covenant by a lessor (not mentioning assigns) to pay for buildings to be erected on the lands demised did not run with the land, and that the lessee or his assigns had no claim as against the land or the devisees of the lessor in respect of the value of buildings so erected.

*Moss*, Q.C., for the defendants.

*Gibbons*, for the plaintiffs.

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## DUNKIN v. COCKBURN.

*Timber licensees—Land not covered by license.*

Owners of timber limits have no right by Statute or Order-in-Council after issue of patent, to haul their timber or logs over the uncleared portion of any land not covered by their timber license and originally located as a free grant.

*J. K. Kerr*, Q.C., and *John A. Paterson*, for the plaintiff.

*McCarthy*, Q.C., and *Falconbridge*, Q.C., for the defendant.

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## STRETTON v. THE CITY OF TORONTO.

*Municipal Corporation—Act of servant—Negligence.*

In an action for damages for injury caused by negligent driving, it appeared that a servant of the defendants, on his way for a wrench, for which he had been sent for the purpose of shutting off the meter from a street hydrant which had burst, without the knowledge or consent of the defendants wrongfully took possession of a horse and buggy belonging to the defendants' City Commissioner, and therewith caused the injury complained of.

*Held*, that the defendants were not liable.

*F. Wright*, for the plaintiff.

*McWilliams*, for the defendants.

*In re* MACDOUGALL.

*Law Society—"Practising solicitor"—R. S. O. c. 140.*

A solicitor who allows his name to be used as a member of a firm of solicitors in proceedings before the Courts, although not a partner in regard to the profits of the firm, is a practising solicitor within the meaning of R. S. O. c. 140.

M., a solicitor of the Court, allowed his name to be used by the firm of M. M. & B. in the usual advertisements and business cards of the firm. Proceedings in the Courts were carried on by the firm of M. M. & B. M. did not participate in the profits of the firm.

*Held*, notwithstanding this, that M. was practising as a solicitor, and was liable to be suspended for practising without having taken out an annual certificate from the Law Society.

Armour, J., dissenting.

Reeve, Q.C., and *Walter Read*, for the Law Society.

*F. M. Macdougall*, for the solicitor.

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REGINA v. YOUNG.

*Canada Temperance Act, 1878, s. 103—Police Magistrate.*

The defendant was convicted at the Town of Perth by and before the Police Magistrate for the South Riding of the County of Lanark for selling, in the said Town of Perth, intoxicating liquor contrary to the Canada Temperance Act, 1878.

The authority of the Police Magistrate was derived from a Commission appointing him Police Magistrate for the South Riding of the County of Lanark, as constituted for the purposes of representation in the Legislative Assembly of Ontario.

The same magistrate had been a few weeks previously by a separate Commission appointed Police Magistrate for the North riding of the County of Lanark, and the North and South Ridings together comprised the whole of the territorial limits of the County of Lanark as constituted for municipal purposes, and no more.



The Town of Perth was situate wholly within the South Riding.

*Held*, that the magistrate was not a Police Magistrate for the County of Lanark within the meaning of s. 103 of the Canada Temperance Act, 1878, and that Lanark was not a County having a Police Magistrate within the meaning of that section.

*Held*, further, (ARMOUR, J., dissenting) that the Police Magistrate was not a Police Magistrate for the Town of Perth within the meaning of s. 103, and that Perth could not in virtue of the said Commission appointing a Police Magistrate for the South Riding of the County be considered a town having a Police Magistrate.

*Per* ARMOUR, J. Perth was under the circumstances a town having a Police Magistrate, and the Police Magistrate had therefore in this case jurisdiction to convict.

*E. F. B. Johnston and Delamere*, for the Crown.

*Aylesworth*, for the defendant.

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## MURPHY v. THE CORPORATION OF THE CITY OF OTTAWA AND DAVID DOYLE.

*Municipal Corporation—Contract in writing for construction of sewer—Contractor and sub-contractor—Master and servant—Interference by corporation inspector—Liability—Joint wrongdoers—Compensation.*

The corporation of the City of Ottawa contracted with the defendant Doyle by agreement in writing to lay down sewer pipes on certain streets in the city of Ottawa, and by their inspector the corporation exercised superintendence over the work as it progressed.

Doyle employed one McCallum to engage workmen and oversee the work. McCallum engaged Murphy, the husband of the plaintiff.

During the progress of the work the sides of the sewer caved in through the faulty and negligent shoring of the walls of the sewer, thereby causing the death of Murphy.

*Held*, that under the evidence the corporation were not liable; that no recovery ought to have been had against either of the defendants, as there was no evidence from which it

could have been reasonably inferred that the deceased was ignorant of the dangerous character of the work he was engaged in, and that he had quite as much knowledge and means of knowledge of its dangerous character as his master, and with such knowledge voluntarily engaged in it; but as the defendant Doyle had not moved against the verdict found against him it was therefore allowed to stand.

*Held*, also, that the corporation by their inspector had not so interfered with the conduct of the work by the deceased as to assume personal control over the deceased within the opinion of Gifford, L.J., in *Stephen v. Police Commissioners*, 3 Court of Session Cases, 535.

*Held*, also, that the action being founded on the relationship of master and servant both defendants could not be held liable, and that the plaintiff by retaining her judgment against Doyle had elected to treat the wrongful act or omission as his, and could therefore have no recourse against the corporation.

*McCarthy*, Q.C., for the plaintiff.

*Lash*, Q.C., for the defendants.

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[FERGUSON, J., 7TH JANUARY, 1887.

[GALT, J., 21ST JANUARY, 1887.

## PARENT v. LORTIE.

### *Equitable execution—Receiving order—Foreign debtor.*

The jurisdiction of the Court exercised on behalf of an execution creditor by way of equitable execution, to make the sheriff receiver of the moneys secured by a mortgage of lands in his county held by the execution debtor, who was resident out of the province.

The plaintiff was an execution creditor of one of the defendants, and the sheriff was unable to make the money on the writs in his hands. The plaintiff then discovered that the execution debtor who had left the Province of Ontario, and was residing in the Province of Quebec, was mortgagee of lands in the Province of Ontario; and he made affidavit that unless he was paid out of the moneys secured by this mortgage he would be unable to obtain payment or satisfaction of his judgment.

*C. L. Ferguson*, for the plaintiff, moved *ex parte* for an injunction to restrain the defendant Fabian Parent, the mortgagor of the lands, from paying to the mortgagee (the execution debtor), and the mortgagee from receiving any moneys secured by the mortgage; and further, to restrain the mortgagee from assigning or otherwise dealing with the mortgage in question; and further, for a reference to take an account of the moneys due and unpaid on the mortgage; and for an order directing payment thereof to the plaintiff, until his judgment and the costs of this action should be fully paid.

FERGUSON, J., after consultation with the Chancellor, made an order restraining the mortgagee from dealing with the mortgage in question and from receiving any moneys payable thereunder, and restraining the mortgagor from paying any moneys to anyone except the sheriff of the county in which the mortgaged lands lay until a certain day, upon which the plaintiff might move to continue, and appointed the sheriff receiver without security or salary, other than the usual sheriff's fees, of all the moneys payable under the mortgage security until the judgment was satisfied.

Upon the return of a motion made to continue this order, *C. L. Ferguson* appeared for the plaintiff, and no one appearing for the defendants,

GALT, J., made the order absolute.

[ROSE, J., 8TH MARCH, 1887.]

### SIMPSON v. CORPORATION OF VILLAGE OF HUNTSVILLE.

*Municipal Corporation—Negligence—Accident occurring prior to organization of municipality—49 V. c. 55—Non-liability—Pleading.*

To an action by plaintiff against defendants for an accident to plaintiff on 11th April, 1886, caused by slipping on a sidewalk of defendants "covered with snow and ice negligently allowed to accumulate thereon by defendants, and being otherwise defective and negligently out of repair for a long time to the defendants' knowledge, and which it was their duty to keep in repair," defendants pleaded that the Village

of H. had not at the date of the accident been organized, according to the terms of 49 V. c. 55, incorporating said Village, and could not have any officers or servants, and could not be and was not guilty of negligence by reason of anything done or omitted previous to or at the said date of said alleged accident.

*Held*, on demurrer, a good defence.

*John A. Paterson*, for the plaintiff.

*Arnoldi*, for the defendants.

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### CHANCERY DIVISION.

[THE DIVISIONAL COURT, 5TH MARCH, 1887.]

#### REGINA v. FEE.

*Canada Temperance Act, 1878, s. 123—Defendant compellable to answer criminal questions—Jurisdiction of Divisional Court.*

A conviction under the Canada Temperance Act, 1878, whereby the plaintiff was adjudged to pay a fine for selling liquor unlawfully, was brought up on certiorari before Ferguson, J., sitting in Court, and was quashed, no cause being shewn and no one appearing to support the conviction, on the ground that the defendant had been obliged to give evidence of his own criminality. After the order to quash had been issued, an application was made on the part of the Crown to open up the matter, on the ground that instructions had been given to shew cause, but that through inadvertence default had happened. The Judge was disposed to accede to the application (if there was jurisdiction to do so), and, with a view of having the whole matters in controversy investigated, sent the application to be disposed of by the Divisional Court.

*Held*, 1. That the right of rehearing which existed in matters of a criminal nature such as the present before the Judicature Act was not interfered with by that Act, and existed in the present case; and, if there was jurisdiction to apply to a single Judge to quash the conviction, there was jurisdiction in the full Court to reconsider his decision.

2. On the proper construction of the Canada Temperance Act, 1878, s. 123, a defendant is compellable, when called as a witness, to answer questions even though tending to criminate himself.

*Regina v. Calpin*, 12 O. R. 330, overruled.

*T. D. Delamere*, for the Crown.

*A. H. Marsh*, for the defendant.

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### HOLMES v. MURRAY.

*Will—Devise—Republication of will by codicil—Mortmain—R. S. O. c. 216—  
38 V. c. 75.*

The decision of Ferguson, J., ante, p. 15, was reversed, and the devise to the charity held good.

*Per* BOYD, C. Though by the statute now in force, the will is to speak from the death of the testator unless a contrary intention be expressed, that does not change the date when the will was made, which is the sole point under the statutes which validate these bequests to religious bodies. The codicils do not revoke but confirm the charitable disposition of the testator shown at the time he made the will, but the source of the bounty does not spring from the last codicil but from the original will.

*Per* PROUDFOOT, J. There is no doubt that for some purposes the will is drawn down to the time of republication or confirmation, as for instance under the old law, to let in after acquired property; but in cases affecting real estate it has been held that if the will be made before the Statute of Charitable Trusts, and confirmed afterwards, or made more than six months before the death of the testator and confirmed afterwards, the devise is good; and these decisions govern the present, and the devise to the charity is good.

J. S. McKay, for the plaintiffs, the trustees.

J. MacLennan, Q.C., for the defendants.

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## HATTON v. BERTRAM.

*Will, construction of—Passing of after acquired property.*

The decision of Proudfoot, J., *ante* p. 106, was affirmed.

*Per* BOYD, C. The word “now” in the devise of Walkerfield—“the property I *now* reside upon,” should not be allowed to control the other parts of the will, and is not sufficient to oust the effect of the statute by virtue of which the will is to speak from the death.

The after acquired property in connection with Walkerfield was intended to pass by the will to the trustees, and by the will they were to hold Walkerfield for the use and benefit of the testator’s daughter.

*Moss*, Q.C., for the plaintiff.

*Lash*, Q.C., and *E. H. D. Hall*, for the adult defendants.

*J. Macleennan*, Q.C., for the infant defendants.

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[BOYD, C., 5TH MARCH, 1887.]

## MASON v. MASON.

*Will, construction of—Devise of incumbered land—R. S. O. c. 106, s. 36—Devolution of Estates Act, 1886, ss. 4, 7.*

The rule that incumbered land is liable for its own burdens can only be varied, in the case of a testator devising the incumbered land, by an express direction.

The words used in ss. 4 and 7 of the Devolution of Estates Act, 1886, relative to the payment of debts, do not apply to the payment of such debts as are charged on land, and by the terms of R. S. O. c. 106, s. 36, are payable thereout as the primary fund.

Motion for judgment in an action by the executors of David Mason for construction of his will.

The will contained a general devise of all the testator’s property, real and personal, to the executors upon trust for payment of debts, etc., and to permit the widow to occupy and receive the profits of the same during her widowhood, and until their youngest child should attain the age of 21. There was then a direction to the executors to convey a

specified lot of land to the testator's son David, upon his attaining 21 years, but no disposition of the residue of his estate after the termination of the widow's interest. The lot devised to David was the only land which the testator had at the time the will was made, but he afterwards acquired another lot which passed under the general devise to the executors, for the benefit of the heirs-at-law. Both lots were incumbered at the time of his decease. There was no reference in the will to the incumbrance upon David's lot. A contention arose as to whether David took free from or subject to the mortgage debt.

*Miller, Q.C.*, for the plaintiffs.

*Denovan*, for the widow.

*J. Maclellan, Q.C.*, for the infant David Mason.

*Moss, Q.C.*, and *Wm. Davidson*, for the other infants.

BOYD, C. According to R. S. O. c. 106, s. 36, the land mortgaged is primarily liable to pay its own burdens, and according to s. 37, if a testator wishes to vary this rule, it must be by a direction applying to his mortgage debts in such terms as distinctly and unmistakeably refer to or describe them: *Nelson v. Page*, L. R. 7 Eq. 28. There is no reference of such a kind to mortgage debts in this will. The fact that there is a specific devise of one lot to David, while the other lot passes under a general devise to the executors in trust for the heirs-at-law, affords no indication of intention that David is to enjoy free of the mortgage debt; nor is such an indication to be gathered from the fact that he directs his debts to be paid out of a mixed fund; *Elliott v. Dearsley*, 16 Ch. D. 328; *Re Smith*, 33 Ch. D. 195; *Re Newmarsh*, 9 Ch. D. 12.

The Devolution of Estates Act, 49 Vic. c. 22, is to be read in conjunction with the sections above cited from the R. S. O., and in that view I do not think that the words used in the 4th and 7th sections relating "to the payment of debts," applies to the payment of such debts as are charged on land, and by the terms of the R. S. O. are payable thereout as the primary fund.

My judgment is therefore that the land devised to David is not exonerated from contributing to pay its proper share of the mortgage created by the testator.

Costs out of estate.

[FERGUSON, J., 10TH MARCH, 1887.]

VANDERVOORT v. YOUKER.

*Demurrer—Averment of malice—Inferred malice—Reasonable and probable cause.*

Y. issued a *capias* before judgment against V. and had him arrested. After the arrest V. tendered \$90 in full of Y.'s claim, which was refused as not being sufficient. Y. then proceeded with his action, but failed to obtain a judgment for more than \$90.

In an action by V. against Y., in which no malice was alleged, but damages claimed for wrongful arrest,

*Held*, on demurrer, that malice would not be inferred, because so far as appeared from the pleadings Y. had reasonable and probable cause for thinking that V. owed him more than \$90, and as malice was not alleged, the demurrer must be allowed with costs: leave to amend given.

*Aylesworth*, for the demurrer.

*Lash*, Q.C., contra.

*In re* MURRAY & KERR.

*Vendor and purchaser—Representation of rents in advertisement—Compensation—Heating—Taxes.*

K. purchased certain property at auction which had been advertised. Among the representations made in the advertisement was one that it "at present rents for \$1,160." After the sale K. applied for compensation, because it appeared that the vendor was bound by agreement with his tenants to heat the building for them and to pay the taxes, and this reduced the actual rental by the amount paid in these respects.

*Held*, that K. was entitled to compensation both as to heating and taxes; and a reference was ordered to ascertain the amounts.

*E. T. English*, for the vendor.

*Hoyles*, for the purchaser.



[22ND MARCH, 1887.]

## McLAREN v. RIVETT.

*Devolution of Estates Act—Intestate mortgagor—Foreclosure—Appointment of administrator.*

The Court will on the application of a mortgagee in a mortgage action appoint an administrator to the estate of an intestate mortgagor.

One Rivett died after 1st July, 1886, intestate, leaving a widow and several infant children. At the time of his death he owned a farm subject to a mortgage to the plaintiff, and little or no personal estate. No one took out letters of administration. The widow remained in possession of the mortgaged premises with the children.

Default having been made in payment of the mortgage, the mortgagee began an action for foreclosure or sale against the widow and infant children. There being no personal representative,

*Langton*, on behalf of the plaintiff, moved for an order to appoint an administrator *ad litem* pursuant to the Act 48 V. c. 13, s. 11. He contended either that a personal representative should be appointed, or that the motion should be refused as unnecessary. The legal estate being in the plaintiff, the defendants had only an equity to redeem, and if it should be considered that he could foreclose them without the appointment of a personal representative he would be satisfied with a refusal of his motion on that ground. If on the other hand he could not foreclose or sell without a personal representative, then he contended that the Court should exercise the power conferred on them by the Act.

[FERGUSON, J. The result is that I must appoint some one for you to foreclose. If I appoint anyone it will be his duty to redeem, and he must be put in a position to get funds to redeem with if there are any. He should therefore administer the whole estate.] Unless the power conferred by the Act is exercised the plaintiff cannot get the relief he is entitled to, for he cannot compel anyone to administer. [FERGUSON, J. Why does he not administer himself? He is a creditor.] He does not desire to take the whole burden upon himself, he only desires to assert a specific lien which he has on part of the estate. Besides, his duty to redeem would conflict with his interest as mortgagee.

*John Hoskin, Q.C.*, for the infant children.

FERGUSON, J., 22nd March, 1887, after considering the motion, held that he should exercise the right conferred upon the Court by the Act 48 V. c. 13, s. 11, by appointing some person who would consent to act as administrator. If no such person could be found, then he would appoint the Toronto General Trusts Company, if he were assured that they had power to hold lands.

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### COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 26TH JUNE, 1886.]

MACGREGOR v. McDONALD.

*Discovery—Affidavit of documents—Evidence on motion for better affidavit—  
Inspection of documents—Rule 234.*

The plaintiff sought to compel the defendant F. McD. to file a better affidavit of documents, and relied upon the affidavit of documents of a co-defendant, D. M. McD., and also upon an affidavit of F. McD., filed upon an interlocutory motion in the action, as shewing that she had in her possession a power of attorney and statements of account which were not set out or in any way alluded to in her affidavit of documents, wherein she stated that the documents set out were the only ones in her possession relating to the action. In the affidavit on the interlocutory motion F. McD. admitted that she had received the power of attorney and statements of account in question from D. M. McD. but not that she had them at the time of making her affidavit of documents.

*Held*, that the affidavit of D. M. McD. could not be received to contradict the affidavit of documents of F. McD., and (reversing the order of Wilson, C.J., in Chambers) that her admissions relied upon were not sufficiently explicit, for it was not to be inferred in the face of her affidavit of documents that at the time of making it she still had the documents which were at one time received by her; and

*Per* ROSE, J., upon a subsequent motion. The Court having refused to order a better affidavit of documents, an

application under Rule 234, made upon the same material, for inspection of the documents in question on the former application could not succeed.

*MacGregor*, for the plaintiff.

*S. H. Blake, Q.C.*, and *Holman*, for the defendant.

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IN CHAMBERS.

[BOYD, C., 14TH MARCH, 1887.]

FRASER v. JOHNSTON.

*Jury notice—Equitable claims—Demurrer.*

Where the plaintiffs claimed specific performance of a contract to supply them with milk for a cheese factory upon certain terms, and in the alternative damages, and the defendants asked for rectification of the contract, the jury notice was struck out.

*Held*, that, where a party seeks equitable relief to which he is not entitled, the opposite party should, unless in a very clear case, demur, instead of attacking the pleading indirectly by asking to have a jury.

*Bingham v. Warner*, 10 P. R. 621, commented on.

*Hoyles*, for the defendants.

*Holman*, for the plaintiffs.

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[ROSE, J., 25TH FEBRUARY, 1887.]

SCOTT v. TOWN OF LISTOWEL.  
LIVINGSTON v. TOWN OF LISTOWEL.

*Assessment—Appeal—Service of notice—Time—R. S. O. c. 180, ss. 56, 59.*

R. S. O. c. 180, s. 59, regulating appeals to the County Judge from the Court of Revision as to the assessment of property, provides, by s-s. 2, that the person appealing shall serve upon the clerk of the municipality within five days after the date limited by the Act for closing the Court of Revision a written notice of his intention to appeal; by s-s. 3, that the

Judge shall notify the clerk of the day he appoints for hearing the appeals; and by s-s. 4, that the clerk shall thereupon give notice to all the parties appealed against. S. 56, s-s. 19, provides that all the duties of the Court of Revision shall be completed and the rolls finally revised before the 1st of July in each year.

The Court of Revision heard the appeals in question on the 10th June, 1886, and rendered judgment on the following day. Notices of appeal dated the 15th June, 1886, were served upon the clerk on the 19th; the Court of Revision sat until 5th July; on the 15th July the clerk notified the Judge that notice had been given of these appeals; and on the 16th July the Judge notified the clerk of the day that he had appointed for hearing the appeals, and the clerk notified the parties.

*Held*, that the limitation in s. 59, s-s. 2, should be construed to mean that notice of appeal should not be served *after* the expiration of five days from the closing of the Court of Revision; and also that the service in this case was to be regarded as within the five days, as the notices were in the hands of the clerk during the five days, and were acted upon by him; and further that service prior to the expiry of the five days was good service.

*Shepley*, for the plaintiffs.

*W. H. P. Clement*, for the defendants.

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[THE MASTER IN CHAMBERS, 13TH APRIL, 1886.]

### LEVY v. DAVIES.

*Interpleader—Sale of goods under order—Levy of money under execution—Creditors' Relief Act, 1880—Costs.*

A sheriff had seized goods under writs of *fi. fa.* in his hands, when the goods were claimed by a chattel mortgagee. An interpleader issue was directed, and an order was made for the sheriff to sell the goods and pay the proceeds into Court, which was done. After the claim of the chattel mortgagee had been barred, a question arose as to the distribution of the money in Court.

*Held*, that the seizure under the writs together with the conversion into money by the sheriff under the order of the Court, and the final barring of the claim of the chattel mortgagee, constituted a levying of the money under the writs by the sheriff, in the sense of s. 5 of the Creditors' Relief Act, 1880, and therefore that the money in Court should be distributed ratably according to the provisions of that Act; but

*Held*, also, upon a construction of s. 35 of the Act, that the execution creditors who contested the chattel mortgagee's claim in the interpleader were entitled to add their costs of the interpleader to their claims, if they did not recover them from the claimant.

*Kappele*, for the sheriff and one execution creditor.

*Watson, C. J. Holman, Aylesworth, W. H. P. Clement, George Bell, John Greer, and Wickham*, for the other execution creditors.

*P. McPhillips*, for the claimant.

[The same question came before the Court of Appeal on appeal from a County Court in *Reid v. Gowans*, 13 A. R. 501, but the Judges disagreed, Hagarty, C.J.O., and Burton, J.A., having the same opinion as the Master in Chambers in the foregoing decision, and Patterson and Osler, J.J.A., taking an opposite view.]

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[28TH MARCH, 1887.]

### SCULLY v. NAGLE.

*Evidence—Rule 285—Preservation of original telegram.*

Motion by the plaintiff for an order to examine before the trial an officer of the Great North-West Telegraph Company, and for the production of the original of a certain telegram which the plaintiff relied upon as part of his case.

*W. H. P. Clement*, for the plaintiff, stated that it was the rule of the Telegraph Company to destroy all original telegrams after six months, and that this application was made *de bene esse*, with a view of preserving the telegram, lest it should be destroyed before the trial.

*J. M. Clark*, for the defendant, contra.

THE MASTER IN CHAMBERS granted the order asked for by the plaintiff.

## NOVA SCOTIA.

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In the Supreme Court.

STEWART v. WAUGH.

*Trespass to land—Adverse possession.*

In 1824 S. W. and M. W. obtained a warranty deed of land known as Ship Yard Island, and went into possession under it. In 1838 they leased the Island to P., who went into possession and occupied until 1839 or 1840.

The plaintiff had no documentary title, but relied on continuous acts of ownership from 1852 down to the time of action brought, October, 1885.

It was proved that the defendants had exercised occasional acts of ownership during the same period; that ten years before action brought the plaintiff agreed with one of the defendants to take care of the island for him and to keep trespassers off; that, when charged with having committed acts of trespass, he denied having done so, and said that the acts complained of were committed by other persons; and that on one occasion when logs were cut the plaintiff denied having cut them, and the logs were removed by one of the defendants.

*Held*, that the plaintiff had not shewn such an adverse and exclusive possession as to avail him against the documentary title of the defendants and the acts done thereunder.

McDONALD, C. J., dissented.

## NEW BRUNSWICK.

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In the Supreme Court.

*Ex parte* CLARKE: *In re* HARVEY.

*Debtor—Consolidated Statutes, c. 38, s. 7—Disclosure—Discharge from arrest—Second application for examination—Res judicata.*

If a debtor applying for examination under the Consolidated Statutes, c. 38, s. 7, is unable to make a full disclosure of

the state of his affairs, and to answer all proper interrogatories without reference to his books, it is his duty to produce them at the examination; and an order made for his discharge without the production of his books will be set aside.

If the plaintiff in the suit, or his attorney, resides within 30 miles of the place where the examination is to be held, 48 hours' notice of such intended examination is sufficient.

*Per* PALMER, J. If a debtor applies for examination, and after a hearing before the proper tribunal his discharge is refused, the matter is *res judicata*, and he cannot make a second application.

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### STEPHENSON v. HOAR.

*Initials—Promissory note—Affidavit to hold to bail.*

It is not sufficient in an affidavit to hold to bail in an action on a promissory note, to describe the defendant by the initials of his Christian name, without stating that he signed the note in that manner.

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### THE INTERCOLONIAL EXPRESS CO. v. McKENZIE.

*Costs—Taxation—Saint John City Court.*

In actions in the Saint John City Court, the sitting Alderman and Common Clerk should tax the costs of the successful party at the time of giving judgment.

Where a judgment was signed on the 22nd November, including in the costs an amount paid for witness' fees, and there was no affidavit made of the payment of the fees to the witness, as required by the Consolidated Statutes, c. 119, until the following day, the Court on review reduced the judgment by the amount taxed for witness fees.

**MANITOBA.**

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**In the Queen's Bench.**

**THE MANITOBA MORTGAGE CO. v. STEVENS.**

*Striking out jury notice.*

A jury notice will not be struck out unless there is some substantial reason for it. The mere assumption that a Judge could try it better without than with a jury is not a sufficient ground.

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**THE HUDSON'S BAY COMPANY v. MACDONALD.**

*Bill for specific performance or rescission—Parties—Pleading—Waiver—Fixtures.*

Distinction between a specific performance suit, and one to rescind a contract in case of failure to perform by a specified time.

The plaintiffs agreed to sell to B. certain lands upon certain terms. B. paid a portion of the purchase money, and afterwards conveyed to the defendant. Afterwards the plaintiffs removed certain buildings from the lands. The buildings were large and built upon stone foundations, a portion of which either originally, or by pressure, were beneath the level of the ground. Upon a bill against the defendant alone for payment or rescission, the defendant claimed repayment of the money paid to the plaintiffs.

*Held*, 1. That *prima facie* the buildings were fixtures.

2. That the purchaser would have been entitled under such circumstances to sue for the return of the purchase money.

3. That the present defendant could not recover the money in the absence of B.

4. That no decree for rescission could be made in the absence of B., the defendant having in no way been substituted for B. as purchaser.



5. To obtain a decree by vendor for specific performance, with an abatement from the purchase money by reason of the removal of buildings, the bill must be so framed.

6. Waiver must be specially pleaded.

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## GALT v. THE SASKATCHEWAN COAL CO.

*Winding up—Money in Court made by Sheriff—Estoppel.*

Under various executions against the defendant Company certain goods were seized. Upon adverse claim being made the sheriff sold the goods and paid the money into Court under the terms of an interpleader order, to abide the result of an issue.

Before the determination of the issue the Company was ordered to be wound up.

The execution creditors having succeeded in the issue moved for payment to them of the money in Court, and were opposed by the liquidator.

*Held*, 1. That the execution creditors were entitled to the money.

2. That they were not estopped from setting up such claim because they had filed claims before the liquidator.

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## HORSMAN v. BURKE.

*Quia Timet—Specific performance of covenant to pay off mortgage—Parties—Trustee—Relief over against cestuis que trustent—Evidence of parol agreement.*

In a conveyance of land the grantee covenanted "to save harmless and indemnify" the grantor from a mortgage previously executed by him, and from all claims and demands in respect thereof.

*Held*, 1. That after demand made by the mortgagee for payment upon the grantor, and before the grantor had paid any money, he could obtain specific performance of the contract.

2. The mortgagee would not be a proper party to such a bill.

3. The grantee must rely upon the covenant and not upon any express or implied agreement to pay off the mortgage.

The answer set up that the defendant purchased not for himself, but as the agent and trustee for five other persons. There was no proof of this fact other than a recital in a conveyance to which the defendant and two of the alleged *cestuis que trustent* were parties.

*Held*, 1. That the conveyance was no evidence against the plaintiff.

2. That the answer could not be read as evidence against the plaintiff.

3. That the allegations in the answer might be considered with a view to directing further investigation into particular facts.

4. That as the *cestuis que trustent* lived out of the jurisdiction, the Court would not, in its discretion, allow further evidence to be given.

*Quære*, whether, in any case, the defendant would be entitled to have the *cestuis que trustent* made parties.

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## REGINA v. PRUDHOMME.

### *In re* NORTH DUFFERIN ELECTION.

*Recount of ballots—Mandamus to County Judge—Ballots not objected to before Deputy Returning Officers.*

*Held*, that a mandamus will not lie to a County Judge to compel him to consider the validity of ballot papers.

*Per* WALLBRIDGE, C. J. Upon a recount should the County Judge consider the validity of ballot papers not objected to before the Deputy Returning Officers, *quære*?

*Per* KILLAM, J. 1. The return of a Returning Officer is not void, when based upon a certificate in proper form of the County Judge, merely because the County Judge has not legally or fully discharged his duties upon a recount of ballots.

2. There being another remedy, viz., an application to the House, a mandamus should not be granted.

*Re Centre Wellington Election*, 44 U. C. R. 132, followed.

*In re* NORTH DUFFERIN ELECTION.

*Preliminary objections—Recognizance—Justice of the Peace—Amendment of security.*

Justices of the Peace have no authority or jurisdiction, save that of the old "Conservators of the Peace," and such as has been given to them by statute. They have no power to take a recognizance upon an election petition.

A person voluntarily entering into a recognizance is not estopped from denying its validity.

The practice in England with reference to security has not been introduced into Manitoba.

If the security upon an election petition be imperfect, there is no power to permit an amendment of it, or the substitution of other security.

Upon a preliminary objection to a petition upon the ground that the recognizance was taken before a Justice of the Peace, the recognizance having been held bad, the petition was dismissed with costs.

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*In re* KILDONAN AND ST. PAUL'S ELECTION.

*Abandoned petition—Costs.*

A petition was filed styled in the Electoral Division of Kildonan. After a preliminary objection had been taken on the ground that the name of the constituency was Kildonan and St. Paul's, a new petition was served together with a notice of abandonment of the former petition.

This notice was styled in the Electoral Division of Kildonan and St. Paul's. Upon a motion by the respondent that the first petition should be discontinued, and that the petitioner should pay the costs incurred,

*Held*, 1. That such an application could be entertained.

2. That, under the circumstances, the application could not be defeated, because the summons was styled in the Electoral Division of Kildonan and St. Paul's.

3. Although the statute requires that two copies of the preliminary objections are to be left with the prothonotary, one

for file and one for the petitioner; yet if one copy be filed, and one be served upon the petitioner, as provided by Rule 14, the petitioner cannot object.

4. Proceedings upon the second petition not stayed until payment of the costs of the first.

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### *In re* CARTIER ELECTION.

*Election petition—Preliminary objections—Status of petitioner—Notice in Gazette—"Immediately"—Identity of petitioner.—Vagueness—Security—Bond—Affidavits of justification.*

The status of the petitioner may be enquired into upon a preliminary objection to the petition.

The absence of notice of presentation of the petition in the *Gazette* is not a ground for preliminary objection.

Meaning of the word "immediately."

The absence of the words "whose name is subscribed," after the name of the petitioner, is not a sufficient ground of objection to a petition.

A petition is not insufficient for vagueness or uncertainty, because it alleges a number of wrongful acts in the alternative. A petition is sufficient if it allege merely that the respondent was guilty of a corrupt practice within the meaning of s. 198 of the Election Act of Manitoba, 1886.

Security for costs may be given by bond to the respondent.

A bond was given to secure certain named costs, "and also all costs which on the final disposal of the petition the Court shall award to be payable as provided by the Manitoba Act."

The statute required security for "any and all other expenses and charges."

*Held*, that the bond was sufficient.

Affidavits of justification need not accompany the bond. But if the sufficiency of the security be attacked, the absence of such affidavit may be considered.

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## DOWNS v. LEE.

*Master and servant—Negligence of servant—Action for damages to goods by mortgagor against mortgagee —Re-demise —Amendments — Evidence — Statements by agent.*

A master is liable for a wrong committed by his servant, when such wrong is committed while the servant is acting within the scope of his authority.

The defendant's son lighted a smudge near a stable to keep away mosquitoes from his father's horses. The fire spread to the stable, and consumed some wheat of the plaintiff stored therein. The jury gave a verdict for plaintiff, and the Court refused to set it aside, Killam, J., dissenting.

In such a case the defendants held a mortgage upon the wheat, executed by the plaintiff. The mortgage was not due at the time of the fire. There was no re-demise clause in it. After the fire and the maturity of the mortgage, the defendant realized the money secured by the mortgage by sale of other property comprised in it.

The wheat had been stored by the plaintiff in the defendant's stable while previously tenant to the defendant, and the defendant had not in any other way taken possession than by occupation of the land and the stable, and by refusing to allow the wheat to be removed until he was paid.

*Held*, that the existence of the mortgage was no defence to the action for the destruction of the wheat, Killam, J., dissenting.

*Per* KILLAM, J. In the absence of a re-demise clause in the mortgage, no action could be brought for the loss of the goods, whether it occurred before or after the expiration of the time for redemption.

2. If there could be held to be an implied re-demise clause (as to which *quære*) the plaintiff could recover only for the loss of enjoyment of the goods between their destruction and the time fixed by the mortgage for payment.

3. Amendments can be allowed only where they are "necessary for the purpose of determining in the existing suit the real question in controversy between the parties," and for the purpose of meeting "any formal objection, . . . to the end that in all things substantial justice may be done."

A count disclosing a cause of action entirely distinct from those upon the record, under the circumstances, should not be allowed.

4. A principal is not bound by the statements of his agent, after the happening of the act sued upon, unless the agent has authority to make such statements.

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THE MANITOBA ELECTRIC AND GAS LIGHT CO.  
v. GERRIE.

*Illegal contract—Uninspected gas meter.*

A statute, after reciting that it was expedient "that the measurement of gas sold and supplied . . . should be . . . regulated by one uniform standard . . . and that all gas meters should be inspected and stamped," provided that it should "not be lawful to fix for use any gas meter which has not been verified or stamped as hereinafter provided," and imposed a penalty for so doing.

In an action by a Gas Company for the price of gas supplied through an uninspected and unstamped meter,

*Held*, that there must be implied from the prohibition against fixing a meter for use, a prohibition against supplying gas through it; and that the plaintiff could not recover.

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*In re* SHOAL LAKE ELECTION.

*Election petition without prayer—Amendment.*

An election petition set forth certain corrupt practices, and concluded as follows: "The petitioner alleges that by reason of one or more of such acts or practices, the election of said C. E. H. was void."

*Held*, 1. That these words did not constitute a prayer for relief.

2. That there could be no valid petition without a prayer.

3. That the petition could not be amended by adding a prayer; and it was dismissed with costs.

*In re* EMERSON ELECTION.

*Election petition—Recognizance taken before a Justice of the Peace—Bond without seals—Amendment.*

An instrument in the form of a recognizance, not under seal, taken before a Justice of the Peace, was filed as security for costs.

*Held*, irregular as a recognizance (*In re North Dufferin Election*, 4 Man. L. R., followed); and invalid as a bond for want of seals.

*Held*, also, that the Court had no power to permit the substitution of other security.

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 McPHILLIPS v. WOLF.

*Interpleader—Security for costs.*

A garnishee admitted his liability to the judgment debtor, but suggested that one B., who lived out of the jurisdiction, claimed the money under an assignment made to him by the judgment debtor. Upon settling the form of the order for an issue,

*Held*, 1. That B. the claimant ought to be plaintiff.

2. That it did not, from this, necessarily follow that he should give security for costs; that the Court could exercise its discretion, and would not order security unless the applicant shewed circumstances warranting that direction.

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*In re* LORNE ELECTION.

*Election petition—True copy—Recognizance.*

The following variances between the original petition and the copy filed were

*Held*, immaterial:—"Person" instead of "persons"; "places" instead of "place"; "John A. McDonell" instead of "John A. McDonald"; "causes" instead of "caused."

The condition of the recognizance was as follows:—"The condition of this recognizance is that John Hall shall *and* well and truly pay."

*Held*, sufficient.

In the certificate at the end of the recognizance one of the sureties was referred as "the above-named W. A. Baldwin." It should have been "William Augustus Baldwin."

*Held*, sufficient.

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### DEDRICK v. ASHDOWN.

*Extending time for appeal to the Supreme Court.*

In support of a summons to extend the time for perfecting security for costs upon an appeal to the Supreme Court, an affidavit was filed shewing that of the two defendants appealing, one resided in Chicago, and the other near Pilot Mound, and that the trespass complained of had ruined the plaintiff's credit, and "on that account the delay in obtaining the required security can be largely accounted for."

*Held*, that no case had been made for an extension of time.

The principles applicable to such applications discussed.

Residence of the appellant out of the jurisdiction and absence of damage, by the delay to the respondent, are matters for consideration upon such an application.

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## ONTARIO.

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High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 11TH MARCH, 1887.]

CLARKSON v. TORONTO STOCK EXCHANGE.

*Stock Exchange—Insolvency of member—Sale of seats—Distribution of proceeds—Preference of Stock Exchange creditors.*

F. & L., brokers in partnership, were members of the Toronto Stock Exchange, being each the owner of one seat at the board. They assigned to the plaintiff for the general benefit of creditors in December, 1884. The Toronto Stock Exchange by their by-laws provided that in case of a member becoming insolvent and not procuring a release from his creditors within a named period the Exchange should have power to realize the seats by sale and the proceeds in



such case were to be applied, first in payment of fines and dues to the Exchange; secondly in payment of claims arising out of Stock Exchange transactions of creditors, being members of the Exchange; and thirdly the balance, if any, to be paid to the insolvent or his legal representative. The seats of F. and L. were sold under the by-laws of the Exchange and the proceeds remained in the hands of the Exchange. Certain members of the Toronto Stock Exchange, claiming to be creditors of F. & L. prior to their insolvency, for debts arising out of Stock Exchange transactions, filed claims under the by-laws prior to the sale of the seats. The plaintiff, on the other hand, claimed to be entitled to the seats and to the moneys arising from their sale under the assignment to him for the benefit of creditors.

All parties concurred in the sale of the seats, subject to their respective rights. This action was brought by the plaintiff, as assignee for the benefit of creditors of F. & L., against the Toronto Stock Exchange for payment to him of the moneys realized from the sale of the seats.

*Held*, that it was competent for the Toronto Stock Exchange to pass the by-laws in question giving the preference to the claims of the Exchange, and to claims of members of the Exchange for debts arising out of Stock Exchange transactions.

That the plaintiff was the legal representative of the insolvents and entitled to the payment to him of the balance of the moneys arising from the sale of the seats after payment of fines and fees due to the Exchange and claims of creditors, members of the Exchange, arising out of Stock Exchange transactions.

And, reversing the judgment of Galt, J., dismissing the action, that as the by-laws of the Exchange did not provide any means for ascertaining or deciding a contest as to what deductions might properly be made from the proceeds of the sale of the said seats, that it was proper to refer this matter for enquiry to the Master.

*Arnoldi*, for the plaintiff.

*Ritchie, Q.C.*, for the defendants.

## CHANCERY DIVISION.

[THE DIVISIONAL COURT, 8TH JANUARY, 1887.]

## WELLS v. LINDOP.

*Slander—Denial of by pleading—Evidence of privileged occasion—Amendment.*

W. was in the employ of a mining company of which L. was the president, and had been working in the mining district under an arrangement by which his wife was to draw half his wages at the head quarters of the company (her home.) After he ceased to be employed by the company, but while still in the mining district and before he was settled with and paid up, his wife with a companion went to L. to apply for some of her husband's wages, and he replied, "We don't owe him anything now, he stole the boat, the cooking stove, and a lot of other things and sold them." The secretary of the company had previously received a letter stating that W. had done what L. said. The defendant by his statement of defence denied using the words, and gave evidence to that effect at the trial, but proposed also to give evidence that whatever the words used were he honestly believed them to be true, and leave was asked to amend by setting this up. The judge who tried the case held that the occasion was not privileged and refused to allow the amendment; and on a motion for a new trial,

*Held*, reversing the judgment of O'Connor, J., that the occasion was privileged, and a new trial was granted to give the plaintiff an opportunity to prove malice.

*Aylesworth*, for the motion.

*D. J. Donahue*, contra.

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## LAWRENCE v. THE CORPORATION OF THE VILLAGE OF LUCKNOW.

*Corporation—By-law—Contract—Novation—Meeting of councillors—Taking possession of building—Acceptance of work on executed contract—Liability of corporation.*

The defendants passed a by-law, approved of by the rate-payers, reciting that there was "an urgent necessity for a

building to be used by the municipal corporation as a lock-up, fire hall, council chamber, and public hall," for the purpose of acquiring the land and erecting such a building at a cost of \$4,500, for the raising of which sum provision was therein made. B.'s tender for carpenter work, etc., including a shingle roof, was accepted, but at a special meeting of the council, at which only three of the councillors with B. and L., the plaintiff, were present, an arrangement was made by which B. threw off \$4 a square and was relieved of the roof part of his contract and L. agreed to put on a metallic roof at \$6 a square, and it was resolved by the said council that "iron shingles instead of wooden shingles be put on the roof of the new town hall." All this was done subject to the approval of the reeve, who was not present, but who afterwards approved of it, and at whose instance L. ordered the material and did the work. L. received a payment on account, but on the discovery of some defects in B.'s work, the defendants refused, although they had taken the possession of the building, to pay the balance on the ground that the roof was not properly done and that L. was a sub-contractor under B. and there was no contract under seal with him.

*Held*, affirming the judgment of O'Connor, J., that the legal effect of this was to consummate a tripartite agreement by which B. was to give up part of his contract and L. was to do the work for a specified price, and that between the plaintiff L., the defendants, and B. there was a novation of contract so far as the roof was concerned, and as to that L. became the principal and only contractor.

*Held*, also, that the taking possession, payment on account, etc., was sufficient evidence to justify a finding of an acceptance of the work as an executed contract, or a case "of an actual and *de facto* performance of the contract by one party, of which the other party has taken, received, and enjoyed the benefit." *The Mayor, etc., of Kidderminster v. Hardwick*, L. R. 9 Ex. 18, cited; *Munro v. Butt*, 8 E. & B, 738, distinguished.

A municipal corporation is liable on an executed contract, for work done by its order on its behalf and for its benefit, though there be no agreement under seal, if the things done were urgently required for the purposes of the corporation,

and especially so when the price to be paid is not of large amount: *Robbins v. Brockton*, 7 O. R. 481, referred to.

*W. Cassels*, Q.C., for the plaintiff.

*Garrow*, Q.C., for the defendants.

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[BOYD, C., 7TH APRIL, 1887.]

### GILMORE v. GILMORE.

*Will—Devise—Lands charged with legacies conveyed during lifetime of testator—Effect of—Maintenance—Dower—Election—Personal estate—Legacies payable out of.*

J. G. by his will (1) devised land to his son J. G. jr. (3, 4, & 5), devised lands to three grandsons (7, 8, 9, & 10), devised legacies to four different daughters and charged them upon the lands devised to J. G. jr. (16), charged the lands devised by 3, 4, & 5 with the maintenance and support of his widow for life and two infant children until they became of age, and inserted two clauses in these words "And I hereby charge the executors of this my last will and testament hereinafter named, with the performance and execution of all trusts and charges by me heretofore made, the same to be borne out of my personal estate.

"I further charge that my personal estate be sold by my executors hereinafter named, said personal estate consisting of all goods and chattels, farm stock and utensils, same to be equally divided, after all debts and funeral and testamentary expenses be paid, the same to be equally divided between all my children."

The testator in his lifetime conveyed the land covered by clause (1) to J. G. jr., without any reference to the charges created by (7, 8, 9, & 10).

*Held*, that the widow was entitled to both dower and maintenance out of the lands charged with the maintenance; that the infant was entitled to maintenance and the benefit under the will, to be invested and accumulate for him; that there was no intestacy as to any part of the personal estate, as it all passed under the wording of the clause set out; that the legacies to the daughters were payable out of the general personal estate.

*Moss, Q.C.*, for the executors.

*J. Maclellan, Q.C.*, for Joseph Gilmore.

*J. Hoskin, Q.C.*, for the other infants.

*W. Cassels, Q.C.*, for the widow.

*R. S. Cassels*, for some of the children.

*Swayze*, for the executrix of a deceased legatee.

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[PROUDFOOT, J., 2ND FEBRUARY, 1887.]

### STEWART v. GAGE.

*Assignments for benefit of creditors—Judgment against assignee after assignment—Proof of claim—Statute of limitations—Balancing of accounts—Payment on account—Appropriation of payments—Interest.*

S. was assignee of J. E., and G. was assignee of E. H. E. Before the assignments J. E. was a creditor of E. H. E., both on an account for money lent and as holder of certain promissory notes. After the assignments S. obtained a judgment against E. H. E., but G. refused to recognise S. as a creditor on E. H. E.'s estate by virtue of the judgment. S. then brought an action against G. on the judgment and asked an account of G.'s dealings with the estate of E. H. E. G. set up the Statute of Limitations. On a reference a Master found (1) That the judgment was an answer to the defence of the Statute of Limitations. (2) That there had been a balancing of accounts between J. E. and E. H. E. as to the account before E. H. E.'s assignment, and as to the notes after E. H. E.'s assignment, and that each balancing of accounts was such a balancing as prevented the operation of the Statute of Limitations. (3) That before the assignments and within six years of action brought, E. H. E. paid several sums to J. E. on general account, and that such payments, as far as the general account outside of the notes was concerned, prevented the operation of the Statute of Limitations. (4) That E. H. E. agreed to pay interest to J. E. and he allowed it to him. (5) That he disallowed some of the items of the judgment, as not having been proved outside of the judgment. (6) That he disallowed certain sums of money omitted from the plaintiff's claim although proved to his satisfaction, as outside the scope of the reference.

On an appeal from the Master :

*Held*, that the judgment recovered against E. H. E. after his assignment, in an action to which G. was not a party, was not even *prima facie* evidence against G.

*Eccles v. Lowry*, 23 Gr. 167, considered.

*Held*. also, that the balancing of accounts before the assignments upon the general account and the payments on account, were sufficient to prevent the operation of the statute.

That the balancing of accounts after the assignments as to the notes, did not prevent the operation of the statute.

That the payments made on general account being appropriated to the account of the whole indebtedness, including the notes, the notes were not barred by the statute.

That the interest was properly allowed, as it was included in the balancing of accounts and the notes were payable with interest.

*A. H. Marsh*, for the plaintiff.

*Wm. Mortimer Clark*, for the defendant.

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[FERGUSON, J., 12TH FEBRUARY, 1887.]

## THE HAMILTON & MILTON ROAD v. RASPBERRY.

*Statutory remedy for penalty—Relief by injunction.*

On a motion by a Road Company for an injunction to restrain R. from passing through toll-gates without paying the tolls when demanded, it was contended that because there was a statutory remedy for the recovery of a penalty for each offence under R. S. O. c. 152, s. 129, the Court would not interfere by way of injunction.

*Held*, that if the plaintiffs established a *prima facie* case in regard to the rights they claimed, there was jurisdiction to interfere by way of injunction pending the determination of the question at the trial, and an injunction was granted upon a consideration of the balance of convenience in favour of the plaintiff.

*Letten v. Goodden*, L. R. 2 Eq. 130, and *Cory v. Yarmouth*, etc., R. W. Co., 3 Ha. 593, considered and followed.

*Waddell*, for the plaintiffs.

*Osler, Q.C.*, for the defendant.

[30TH MARCH, 1887.]

## THE INCORPORATED SYNOD OF THE DIOCESE OF TORONTO v. LEWIS.

*Rectory lands—Imp. Stat. 31 Geo. III. c. 31, s. 38—Endowment—City Rectory—Township Rectory—Sale of lands under 29 & 30 V. c. 16—Distribution under 41 V. c. 69, (O.)—City Incumbents—Township Incumbents—Who entitled to participate.*

The church of St. James was erected into a rectory at the city of Toronto, within the township of York, by patent under Imp. Stat. 31 Geo. III. c. 31, s. 38, in 1836, and was endowed at different times with lands situate some in the city of Toronto and some in the township of York.

When the lands were sold under 29 & 30 V. c. 16, and had to be distributed by the plaintiffs, under 41 V. c. 69 (O.), there were clergymen of parishes in the city of Toronto and in the township of York, and it was contended that only the clergy of the city parishes were entitled to participate in the distribution of the fund.

On a special case being stated for the opinion of the Court, it was

*Held*, that the city of Toronto was for the purposes of the grant erecting the rectory, considered as being within and a part of the territory of the township of York, and the grant was for the benefit of both the township and the city as one territory; that the duties of the first rector of St. James extended over the whole township; the township was his parish; that the incumbents of the churches in the township must, under 41 V. c. 69, s. 2 (O.), be included among the participants of the fund, unless there was some reasonably clear enactment taking their rights away, which did not appear either in that statute or 29 & 30 V. c. 16.

*Moss, Q.C.*, for the plaintiffs.

*Robinson, Q.C.*, and *McMichael, Q.C.*, for the township incumbents.

*J. MacLennan, Q.C.*, for the city incumbents.

## COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 12TH MARCH, 1887.]

## WILSON v. RYKERT.

*Appropriation of payments—Statute of Limitations.*

Appropriation of payments are to be made (1) as the debtor directs at the time of payment; (2) when no direction by debtor, then as the creditor directs; (3) when neither makes any direction, then the law will apply it to the older debt, as may be just.

The defendant was indebted to the plaintiff, and gave him promissory notes therefor, which fell due in 1871. The interest was paid up to August, 1878. Thereafter three payments were made, two specially on account of interest, and the third without any appropriation.

*Held*, that the payments must be applied to the interest due on all the notes, the effect of which was to take them out of the Statute of Limitations.

• *Masten*, for the plaintiff.

*Osler, Q.C.*, and *Aylesworth*, for the defendant.

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GORST v. BARR.*Slander—Privileged communication—Crime.*

The plaintiff had been working for a couple of days for the defendant as a seamstress. She was unknown to the defendant before that. The defendant missed \$11, and so informed plaintiff. In the evening the defendant drove plaintiff home, telling her she would want her again in a week or so. The next day the defendant laid the case before the chief of police, and he said that plaintiff must have taken the money. The defendant then went to a Mrs. W., for whom she thought the plaintiff was working, and on being informed that plaintiff was not there, asked to speak to Mrs. W. alone, and then informed her of having missed the money, and of the plaintiff being the only one there except defendant's children and defendant's sister. The defendant stated what the chief of



police had said, and asked what she should do—that she would have plaintiff arrested. Mrs. W. advised her not to, but to go and see plaintiff. The defendant then went to a Mrs. B., for whom plaintiff was working, and called plaintiff outside and told her what the chief of police had said. The defendant then put her hand on the plaintiff's shoulder, and said, "You did, you must have taken it," and asked her to confess and give back the money, and defendant would give her all her sewing. The plaintiff denied taking the money, and asked to be taken to her father's, and plaintiff drove her there. Before doing so plaintiff went up stairs to get her things, when Mrs. B. asked what was the matter, when plaintiff said that defendant accused her of taking some of her money. Mrs. B. said that while defendant and plaintiff were speaking the door blew open, and she heard defendant say, "You did, you must have," and the door then slammed to. When defendant arrived at the father's she did not want to go in, but the father pressed her, and asked her what was the trouble. The defendant told him she had lost \$11, and what the chief of police had said. The father asked defendant if she knew the plaintiff's character, and why she should be accused more than the defendant's sister. The defendant, he said, appeared shocked at that, and said she would have plaintiff arrested, when the father said she would do it on her own responsibility.

*Held*, that the action of slander failed—that the words spoken to the plaintiff and to her father were privileged, while those heard by Mrs. B. did not impute any criminal offence, nor did the words spoken to Mrs. W.

*Delamere*, for the plaintiff.

*Foster, Q.C.*, for the defendant.

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### COATES v. COATES.

*Contract—Specific performance—Statute of Frauds—Part performance.*

The judgment in this case *ante* p. 11 affirmed with costs.

*Aylesworth*, for the plaintiff.

*W. Cassels, Q.C.*, and *R. S. Cassels*, for the defendant.

## PALMER v. RICHARDS.

*Principal and agent—Estoppel—Evidence.*

Action to recover commission on sales made by plaintiff while in defendants' employment, the cash therefor however being received after plaintiff left defendants' service.

The defendants, type foundry in Edinburgh, employed plaintiff's father as their agent in Canada, to be paid by a commission "on the receipts, *i. e.*, on the cash, bills, and value of old metal received." He also had a small guaranteed salary. It was understood that as soon as the father got too old to manage the business the plaintiff was to succeed him; and in 1880 this was effected. In 1882 the plaintiff was dismissed from the defendants' employment. He wrote complaining of his dismissal, but said that the sting was taken out of it by the defendants having allowed his father \$1,250 a year, for which the plaintiff said he was grateful. The plaintiff made no claim then against the defendants, because, as he stated in his evidence, that had he made any, the allowance to the father would have been stopped, and in order to induce the defendants to pay it, and in consequence of such silence and want of action on plaintiff's part the allowance was paid up to the father's death in 1884. After the father's death the plaintiff for the first time pressed his claim.

*Held*, that he was not entitled to recover.

*Per* ROSE, J. The plaintiff was equitably estopped from maintaining the action.

*Per* CAMERON, C. J. The plaintiff by the express terms of the contract was only entitled to commission on moneys received during his employment and not afterwards.

*Osler*, Q.C., and *T. P. Galt*, for the plaintiff.

*Robinson*, Q.C., and *W. M. Hall*, for the defendants.

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HARTNEY v. ÆTNA INSURANCE COMPANY.*Insurance—Fire—Evidence of loss—Proof of loss.*

Action on a policy of fire insurance on a stock of goods. M., the local agent through whom the insurance was effected, stated that he had examined the premises, and considered

from the size of the store, the appearance of the goods, and the stock book, that when the insurance was effected there were goods to the amount thereof. All the goods on the premises were destroyed by fire on 20th October. The defendants' inspector came immediately and saw plaintiff, who produced a statement shewing the amount of the stock in May—the insurance having been effected in June—the sales since then, and invoices of goods purchased up to the time of the fire.

The inspector then gave plaintiff a form from which the proof papers were to be made up; and on his return home sent the proof papers, with request to fill in same according to the form, which the plaintiff did, and requested defendants to notify him if not correct, when he would have same made out to defendants' satisfaction. The defendants' wrote in reply stating they thought the amount of loss should be \$11,734.90 instead of \$13,005, the amount claimed; but this sum was not only reasonable but liberal; and which "we are liable for without prejudice to or waiver of any condition of our policy." This letter was received without any objection as to its admissibility. The plaintiff replied that his claim was a just and honest one, but he would accept a deduction of \$400 if claim settled at once. The defendants replied that their offer was a fair and reasonable one, and pointed out what they considered the objectionable items of the claim. The plaintiff then made a statutory declaration of the amount of the loss according to the above form, which he sent to defendants. The defendants wrote acknowledging above, and stating that without admitting but denying any liability they drew attention to the alleged informalities in the proofs in their not specifying loss in detail under each item, and in not giving detailed statement of claim. The plaintiff then furnished defendants with a statutory declaration giving a detailed statement of his claim.

*Held*, there was sufficient evidence of the amount of the goods at the time insurance effected, and also of the goods insured being those destroyed by the fire; and also that under the circumstances there could be no objection to the proofs of loss.

*McCarthy*, Q.C., for the plaintiff.

*J. K. Kerr*, Q.C., and *W. H. Walker*, for the defendants.

## PROCTOR v. MULLIGAN.

*Sale of land—Independent agreements.*

On 5th June the plaintiff executed an agreement whereby he agreed to purchase from the defendant a lot in Winnipeg at and for the sum that might be placed thereon by D. of Winnipeg, provided that if the price fixed exceeded \$6,000, the excess should be secured by plaintiff by mortgage on said property, etc. The sum so fixed to be paid by plaintiff deeding to the defendant his interest in certain lots in Toronto. On the same day defendant executed an agreement whereby he agreed to purchase from plaintiff the plaintiff's interest in the said Toronto lots for \$6,000; the defendant to pay interest and taxes to date, but to deduct the same out of the \$6,000. The Toronto property was conveyed to the defendant, who entered into possession and paid off the mortgages on it. The defendant contended that D. had valued the Winnipeg property at \$8,000; but the evidence shewed that D. had declined to make any valuation. The defendant refused to convey it except at the price of \$8,000, and also refused to appoint another valuator. In an action to recover from the defendant the sum of \$6,000, the plaintiff intimated that he would accept a conveyance of the Winnipeg property.

*Held*, that unless defendant accepted the offer to take a conveyance, the judgment should be for the \$6,000, less a sum of \$838.28, paid for interest and taxes, leaving a balance of \$5,161.72, with interest.

*Osler*, Q.C., for the plaintiff.

*Lash*, Q.C., and *R. S. Cassels*, for the defendant.

## UNITED STATES EXPRESS CO. v. DONAHUE. 7

*Accomplices—Civil action—Corroboration.*

In an action to recover from defendant moneys alleged to have been stolen from the plaintiffs;

*Held*, Galt, J., dissenting, that the effect of the Judge's charge was to leave on the minds of the jury the impression that the evidence of accomplices in crime, where such crime

gives rise to a civil action in which such accomplices are examined as witnesses, ought not to be relied on unless corroborated, which was misdirection.

*J. K. Kerr, Q.C., and Cowper, for the plaintiffs.*

*Osler, Q.C., for the defendant.*

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## GRAHAM v. ONTARIO MUTUAL INSURANCE CO.

*Insurance—Fire—Incumbrance—Unreasonable condition.*

The application for a policy of insurance against fire stated that there was no incumbrance. The application was filled out by the company's agent; the insurer informed him of the existence of a mortgage on the property, when the agent told plaintiff that if there was nothing overdue thereon it was not an incumbrance; and as there was nothing overdue, under this belief the statement was made in the application. A policy was issued shortly afterwards with conditions endorsed thereon, under the heading statutory conditions and variations, No. 13 of which was that any fraudulent misrepresentation contained in the application, or any false statement therein respecting the title or ownership of the property, or the concealment of any incumbrance, or the failure to notify the company of any mortgage or incumbrance upon or other change in the title or ownership of the insured property, etc., rendered the policy void.

*Held, Galt, J., dissenting, that under the circumstances the policy was not avoided.*

*Chatillon v. Canadian Mutual Ins. Co., 27 C. P. 450, followed.*

Per GALT, J. Though before the issue of the policy the insurance was not avoided, yet it would be so thereafter, as under the conditions the plaintiff should have notified the defendants of the mortgage.

The 14th variation condition was: "If any agent or canvasser for this company shall have filled up any part of the application, he shall be the insured's agent therefor and not the company's; and no statement written or verbal made to such agent or canvasser as to any matter to which the enquiries in the application extend, shall bind the company, or affect

the company with notice thereof, unless stated in the application."

Per ARMOUR, J., at the trial, and per ROSE, J., in term. The condition was unjust and unreasonable.

*J. MacLennan*, Q.C., for the plaintiff.

*Macmillan*, for the defendants.

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## WORDEN v. CANADIAN PACIFIC RAILWAY CO.

*Railway Company—Failure to deliver goods—Damages.*

The plaintiff on 2nd March, 1882, delivered to the G. W. R. Co., at Lucknow, Ont., 840 bushels of oats to be carried by said railway and connecting railways to Brandon, Man., and there delivered to the plaintiff. The oats were shipped in car No. 6263, and while in transit were transferred to car No. 3966 of the M. & M. R. Co. Before the arrival of the oats the plaintiff arranged with defendant's agent at Winnipeg to have car 6263 stopped at Winnipeg. The oats were not stopped at Winnipeg, but were carried on to Brandon. The plaintiff before leaving Brandon, and making the Winnipeg arrangement, had instructed an agent at Brandon to receive the oats. The oats arrived at Brandon on 5th May, 1882. The plaintiff's agent at Brandon frequently applied for same, and was always informed that they had not arrived. The defendants alleged that after the arrival at Brandon, notice thereof was sent by P. O. card to the plaintiff's proper address at Brandon, and the goods being of a damageable or perishable nature, were on 22nd July sold. There was no evidence to show that the notice reached the plaintiff. In an action for damages for non-delivery and for conversion ;

*Held*, that the plaintiff was entitled to recover; that defendants were not protected by 42 V. c. 9, s. 17 (D.), and subsections, for to come within it the goods must remain in the defendant's possession for at least a year, unless the tolls have been demanded from the persons liable, and payment refused or neglected for six weeks after demand; and though s.-s. 3 says nothing of demand, the whole section must be read together, which shews a demand was required: that the post card was not a sufficient demand: that there

was no breach in not stopping at Winnipeg, as the contract to stop only applied to car 6263; and that the plaintiff was entitled to recover as damages the value of the oats at Brandon at the time of conversion.

*Arnoldi*, for the plaintiff.

*W. Nesbitt* and *P. McPhillips*, for the defendants.

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## REGINA v. SPROULE.

*Canada Temperance Act, 1878—Interest of magistrate—Witness.*

In a prosecution under the Canada Temperance Act, the defendant claimed that J. F. A., one of the magistrates, was a member of an association for the enforcement of the Act, and had been present at a meeting of the Association. On the case coming on for trial, the defendant raised an objection to the jurisdiction of the magistrates, which was overruled. The license inspector who laid the information then gave evidence in support of the charge. In cross-examination he was asked by defendant as to whether he laid the information of his own accord, or had consulted with J. F. A. before acting, and whether the association had anything to do with the selection of the magistrates. At the close of the prosecution, the magistrates ruled that the witness was not bound to answer the questions, and on going into evidence the defendant called the magistrate J. F. A. as a witness, but he refused to give evidence.

The defendant was convicted and fined.

*Held*, that as a general rule a person who lays an information is not bound to declare the source thereof; but as the questions asked had been put with the view of shewing the magistrate was a member of the association, and thus disqualified by interest from sitting, the defendant had the right to put the questions which were therefore improperly disallowed; and for that the magistrate also should have given evidence when called on.

The defendant therefore, having been deprived of the right of making a full defence as allowed by s. 30 of 32 & 33 V. c. 31 (D.), the conviction could not be sustained and must be set aside.

The calling of a magistrate sitting on a case as a witness and his being sworn, does not of itself disqualify him from further acting in the case.

*Aylesworth*, for the defendant.

*Delamere* and *E. F. B. Johnston*, for the Crown.

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*Re WEIR.*

*Extradition—Depositions—Authentication of—Admissibility—Evidence—  
Sufficiency of—Weight of.]*

In extradition proceedings the information, warrant, and depositions were certified under the hand and seal of a Justice of the Peace of Oscoda township, in the County of Josio, in the State of Michigan. There was also a certificate under the hand of the clerk of the county of Josio, and clerk of the Circuit Court for the said county, and the official seal of the said Circuit Court, certifying that the said Justice of the Peace was at the time of signing his certificate a duly elected and qualified Justice of the Peace, in the active discharge of the duties of the said office, and that his official seals were entitled to full credit.

*Held*, that the documents were sufficiently authenticated.

*Held*, also, that the depositions and statements admissible in evidence are not restricted to those made in respect of the charge upon which the original warrant was issued.

*Held*, also, that the depositions, etc., before the county Judge, before whom the extradition proceedings were had, disclosed sufficient evidence to warrant the defendant being placed on his trial for murder, caused, as was alleged, by the defendant having feloniously ravished the deceased while in such a state of disease as to hasten her death.

*Per CAMERON*, C. J. The Divisional Court cannot review the decision of the judicial officer having jurisdiction to hear extradition cases upon the weight of evidence merely; and

*Per ROSE*, J. It was not necessary to express any opinion on this point.

*Aylesworth*, for the prisoner.

*Hutchinson*, for the State of Michigan.



## THORNE v. WILLIAMS.

*Ejectment—Deed, alteration of—Equitable title—Adding party.*

In an action to recover possession of land it appeared that one of the deeds required in proving plaintiff's title was altered by the grantor's agent under the authority of a letter from the grantor.

*Held*, that the deed was void, but that the plaintiff was entitled to recover on his equitable title. Leave was granted to add the owner of the legal estate as a party plaintiff.

*J. E. Robertson*, for the plaintiff.

*McCullough*, for the defendant.

## BEAM v. ABSOLOM MERNER.

*Patent of invention—Threshing machines—Omission to label—Royalties—Damages—Change in co-partnership—Right to dispute patent—Principles of patent.*

The jury having found that the machines were manufactured after the principle of plaintiff's patent, and that plaintiff had sustained damages by reason of the breach of defendant's covenant, the learned Judge before whom the action was tried directed judgment to be entered for the plaintiff for the royalties and damages.

*Held*, that the plaintiff was entitled to judgment in respect to both royalties and damages; that a change in defendant's firm did not disentitle plaintiff to recover from the new firm; that it was not open to the defendant to dispute the validity of the plaintiff's patent; that the jury were warranted in finding that the machines were made after the principle of the patent.

*John King*, for the plaintiff.

*Osler, Q.C.*, and *E. P. Clement*, for the defendant.

## BEAM v. SIMPSON MERNER.

*Patent of invention—Right to manufacture and sell—Payment of royalty—Infringement of—Estoppel—Want of novelty—Subject of patent.*

Action for the recovery of royalties payable under an agreement in the manufacture by defendant of a threshing machine patented by plaintiff.

*Held*, that the defendant constructed the machines under the agreement, and must pay the royalties ; that the defendant could not dispute the validity of the patent because of want of novelty, nor allege that it was not the subject of a patent ; that the combinations were properly patented ; that the defendant was estopped from setting up a defence which had been negatived in a former action between the same parties.

*Colquhoun*, for the plaintiff.

*Osler Q.C.*, and *E. P. Clement*, for the defendant.

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### STEINHOFF v. McRAE.

*Conversion—Saw-logs—Finding of jury—Licence to take timber after time expired before removal—Parol evidence—Admissibility.*

In trover for certain timber the defendant claimed under a contract for sale thereof to him. The jury in reply to a question stated that it was one of the conditions of sale that timber had to be removed within two years. All the other questions having been answered in the plaintiff's favor the learned judge entered judgment for the plaintiff.

On motion of the defendant to enter judgment in his favor, on the ground that, the jury having found that the licence was for a time that had expired, plaintiff must fail,

*Held*, following *Johnston v. Shortreed*, 12 O. R. 633, that the judgment was wrong : that parol evidence is admissible to explain or contradict a receipt which is not a contract.

*Douglas, Q.C.*, for the defendant.

*Aylesworth*, for the plaintiff.

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### MEAD v. O'KEEFE.

*Partnership—Dissolution—Good will.*

On 3rd April, 1882, a deed of partnership was executed by the defendants O. and H., and by M. as maltsters and brewers in Toronto for three years. By clause 20, O. for \$25,000

sold and disposed of to H. & M. all his interest in the good will of the firm, etc., theretofore existing between himself and G. M. H. as brewers, etc., as also that which he would be entitled to on the expiration or sooner determination of the partnership then formed, and agreed in the meantime to fully initiate and instruct H. and M. in the business and to assign to them all his right, title, interest, claim, and demand of into or out of the good will of the said business and partnership heretofore existing and carried on by O. & Co., and also in the good will, etc., and covenanted to execute a good and sufficient deed to assign and transfer same. Then followed provisions for O. entering into partnership with either or both H. and M., on the determination of the existing partnership, but if not O. should retire and receive the value of his share but nothing further of the good will, and he covenanted not to carry on a similar business, etc. Clause 19 provided for the accounts being taken on the expiration or sooner determination of the partnership and the partners paid the value of their shares. By clause 29, if either H. or M. should retire from the firm under Art. 2, or be compelled to leave under Art. 3, he should not receive anything for good will. Art. 3 provided for dissolution upon breach or non-observance of any stipulation in certain of the articles, upon notice in writing being given thereof, and the partner receiving notice should be considered as quitting the business for the benefit of the other partners. Subsequently M. misconducted himself in the said business, when O., acting for himself and H., informed M. that he must leave, and the following paper was drawn up: "Notice is hereby given that the partnership heretofore existing between the undersigned as brewers, etc., has this day been dissolved by mutual consent. Messrs. O. and H., who will continue the business, are authorized to collect all debts due to the late firm and will meet all liabilities." This was signed by O., H., & M. Under this was written: "Referring to the above the undersigned have this day entered into partnership as brewers, etc., under the new style of O. & Co., who will continue the business as formerly." This was signed by O. & H. A suit was brought by E. M., the assignee of M. under an assignment to her, and a decree was made for an account, but not as to the good will, as it was held this was not covered by the

arrangement. The good will was then assigned to plaintiff and this action brought to recover the value thereof.

*Held*, that the plaintiff under the circumstances was entitled to recover.

*J. MacLennan, Q.C., and Osler, Q.C., for the plaintiff.*

*Moss, Q.C., and G. T. Blackstock, for the defendants.*

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[ROSE, J.]

SCOTT v. SCOTT.

*Will—Execution—Validity.*

A testator brought a will, which had been previously signed by him, to two persons to sign as witnesses. The witnesses signed in the testator's presence at his request and in the presence of each other; and they either saw or had the opportunity of seeing the testator's signature.

*Held*, that the will was invalidly executed.

*Graham, for the plaintiff.*

*Elgin Meyers, for the defendant.*

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O'RORKE v. CAMPBELL.

*Illegitimate child—Custody and care of.*

The father of an illegitimate child has the right to the custody and care of the child as against a stranger or person other than the mother. The mother has the right as against the father, and the father has the right as against the grandfather and grandmother.

Action for food, clothing, lodging, and other necessities supplied by the child's grandmother at the mother's request.

Defence: That the defendant demanded from the plaintiff, the infant's maternal grandmother, and from the child's mother the person of the infant, both of whom refused to comply. Averment, that he is and always has been ready and willing to support the child and furnish it with food, etc.

*Held*, on demurrer, that the statement of defence furnished a good answer to the action.

*J. H. Ferguson, for the demurrer.*

*Aylesworth, contra.*

## ROSS v. WILLIAMSON.

*Document—Loss of—Proof of contents—Necessary evidence of.*

Where a party endeavors to prove by oral testimony the contents of a written document, the Court before giving effect to such testimony should be convinced that all the terms have been proven. It is not sufficient for the party undertaking such a duty to furnish evidence of certain clauses which support his claim, but he must set out the whole agreement so that the Court may be able to give effect to all its provisions, and that by testimony of the clearest nature.

In this case the learned Judge was of opinion that the defendant, the parties setting up the agreement had failed to establish it.

*G. T. Blackstock and Walsh, for the plaintiff.*  
*Fletcher, for the defendant.*

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IN CHAMBERS.

[WILSON, C. J., 1st April, 1887.]

*In re* MACDONALD, A SOLICITOR.

*Solicitor and client—Costs, taxation of—Præcipe order.*

An application on behalf of one Jones for taxation of a solicitor's bill of costs, which had been rendered to him more than a month, but less than a year before the application, was made to the local Judge at Cornwall, and an order for taxation was granted; but on a subsequent application the local Judge directed that the costs of the order for taxation should be taxed as costs only of a præcipe order.

*Aylesworth, for Jones, appealed from this direction as to costs.*

*Kappele, for the estate of the solicitor.*

WILSON, C. J., refused to interfere with the order and dismissed the appeal without costs, as he was not informed upon what grounds the local Judge had given the direction; but he held that an order for taxation of a solicitor's bill could not be obtained on præcipe after a month from the delivery of the bill.

## WILLIAMSON v. AYLMER.

*Taxing officer, powers of—Evidence—Solicitor—Retainer.*

The taxing officers have the power to call for evidence on taxations pending before them.

Where the plaintiff was out of the jurisdiction, and a taxing officer had refused to proceed with the taxation of her costs of the action against the defendants until she was produced before him for examination, touching her retainer of the solicitor in whose name the proceedings in the action had been conducted, it was directed that the officer should first examine other witnesses, and then if unable to decide the question of retainer should report to a Judge in Chambers.

*H. J. Scott, Q.C.*, for the plaintiff.

*Aylesworth*, for the defendants.

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[BOYD, C., 4th April, 1887.]

## WELLS v. NORTHERN R. W. CO.

*Dismissing action—Delay in prosecuting—Terms on which plaintiff allowed to proceed—Jury.*

Action in the Chancery Division to compel the defendants to maintain a subway under their track, where it crosses the plaintiff's farm.

Motion by the defendants, by way of appeal from the Master in Chambers, for an order dismissing the action for want of prosecution. Toronto was named as the place of trial; issue was joined and a jury notice served on the 8th December, 1886, and the plaintiff was in default by reason of two assizes having been held since the joinder of issue. The plaintiff's excuse for not going down to trial at the winter or spring assizes was that he was a very old man and was not able to attend personally at the times the assizes were held, but he hoped to be able to attend at the summer assizes. A motion had previously been made by the defendants to strike out the jury notice and had been refused.

*Boulton, Q.C.*, for the defendants, did not press for an absolute dismissal of the action; but urged that the plain-

tiff should be allowed to continue it only upon terms of his going down to trial at the Chancery Division sittings, 27th April, 1887. This would of course mean that the action should be tried without a jury.

*Reginald Boulton*, for the plaintiff, contra, contended that the plaintiff had sufficiently excused his delay, and that he should not in any case be deprived of his right to a trial by jury.

BOYD, C., held that the plaintiff had not excused his delay in going to trial, and that the defendants were strictly entitled to have the action dismissed. The plaintiff might bring a new action if he chose. He thought it a reasonable term to impose, if the plaintiff desired to continue this action, that he should go down to trial at the Chancery Sittings in the present month. The order would be that the plaintiff should bring the action on for trial at these sittings, or in default that the action should be dismissed, with costs.

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## HUTTON v. YOUNG.

*Counter-claim—Striking out—Nuisance.*

An action of trespass for removing certain logs of the plaintiff's from a stream in which they were floating. The defendants alleged that they were riparian proprietors on the stream and that they had removed the logs and other matters because they interfered with their enjoyment of the stream, and in order to abate what amounted to a nuisance, and they counter-claimed for damages caused by the nuisance.

On the plaintiff's application the Master at Goderich made an order striking out the counter-claim, from which the defendants now appealed.

*Hoyle*, for the appeal.

*Shepley*, contra.

Rules 127 (b) and 168; *Gray v. Webb*, 21 Ch. D. 802; *Huggins v. Tweed*, 10 Ch. D. 359; *Barber v. Blayberg*, 19 Ch. D. 473; *Mayor, etc., of Colchester v. Brooke*, 7 Q. B. 339, were referred to.

BOYD, C. I think it is plain enough from the pleadings that this counter-claim is a mere consequence of the defence; there will be no hardship in trying it with the rest of the defence. If the defendants can shew that what they complain of is a private nuisance, both their defence and counter-claim will be established. Everything depends upon that. The counter-claim can be conveniently disposed of with the other matters, and should not be made the subject of another action. Appeal allowed. Costs in the cause to the defendants.

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[6TH APRIL, 1887.

*In re* GABOURIE, CASEY v. GABOURIE.

*Will—Executor—Investment—Breach of trust.*

G. lent money to W. on his promissory note, and when he died held such note as security. By his will he directed his executors to get in the moneys outstanding and invest the same in such stocks as they might deem advisable. C., the executor who proved the will, left the loan outstanding on the note, and at a subsequent time renewed it and took a new note made by the firm of W. Bros., of which W. was a member. The reason this was done was, as C. stated, because he could get  $7\frac{1}{2}$  per cent. interest for the estate, which was more than he could do if he invested it in stocks. W. Bros. afterwards became insolvent and the amount of the note was lost to the estate. It was shown that the executor was advised not to invest in stocks. The Master in taking the accounts ruled that the amount of the note should not be charged against G. personally; but on appeal it was

*Held*, that it was a very obvious case of breach of trust, which could not be excused whatever might be the hardship resulting to the executor. Interest was allowed to him, however, at the increased rate from the date at which he was charged with the note, and it was directed that interest should not be charged against him at 6 per cent., if it was proved that he could not have invested in stocks to realize that rate.

*Sherry*, and *Stephen O'Brien*, for the adult appellants.

*F. W. Harcourt*, for the infant appellants.

*Langton*, for the executor.



*In re* HAGUE, TRADERS' BANK v. MURRAY.*Costs—Executor—Taxation—Moderation.*

Bills of costs for services rendered to an estate after a testator's death, down to the date of an order for the administration of the estate, were paid by the executor after the order and pending administration proceedings.

*Held*, that there could be no taxation of the bills as against the executor at the instance of creditors, but that the bills should be moderated. So far as the solicitors were concerned the payment by the executor was to be regarded as payment of the bills, and to obtain a taxation after payment a case would have to be made against the solicitors.

Practically the moderation might be so conducted, if warranted by special circumstances, as to differ but little from a taxation.

*Lefroy*, for the plaintiffs and the Central Bank of Canada.  
*Reesor*, for the executor.

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[FERGUSON, J., 16TH MARCH, 1887]

*In re* HAGUE, TRADERS BANK v. MURRAY.*Judgment against executor—Evidence as against creditors—Notice of dishonour.*

The Traders' Bank and Central Bank in September, 1886, obtained judgment against T. M., the executor of W. H. deceased, upon certain promissory notes endorsed by W. H., which fell due after his death and were dishonoured. In December, 1886, the Traders' Bank obtained an order for the administration of the estate of W. H., and in the course of proceedings in the Master's office, the two Banks brought in their judgments, as proof of their claims against the estate.

Thereupon the other creditors by the solicitor appointed to represent them, asked leave to go into evidence to show that when the said promissory notes fell due and were dishonoured no proper notice of dishonour was given to T. M.

The Master ruled that the judgments were only *prima facie* evidence against the other creditors, and gave them leave to go into evidence as desired.

The Banks appealed.

*Held*, that the judgments were conclusive evidence as against the other creditors, of the existence of the debt and the relation of debtor and creditor; though

*Semble*, they would be only *prima facie* evidence against heirs and devisees.

*S. H. Blake, Q.C.*, and *Lefroy*, for the appeal.

*J. Reeve*, contra.

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[ROSE, J., 2ND APRIL, 1887.]

### HOOEY v. GILBERT.

*Discovery—Examination of defendants before statement of claim—Ex parte order.*

In an action by creditors of defendant R. to set aside conveyances by him to defendant G. as fraudulent, the plaintiff swore that it was necessary to have an examination of the defendants before delivering the statement of claim in order that it might be framed with proper particularity as to the fraud, of which they had no personal knowledge, and a Local Master, upon the application of the plaintiff *ex parte*, made an order for such examination.

*Held*, that the order should not at any rate have been made *ex parte*, and that in this case the order should not have been made at all, the position of a defendant resisting a claim as to which he has no personal knowledge, and of a plaintiff advancing such a claim, being vastly different.

*C. J. Holman*, for the defendants.

*Aylesworth*, for the plaintiffs.

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### *In re* MACFIE v. HUTCHINSON.

*Prohibition—Division Court—Attachment of debts—R. S. O. c. 47, s. 125.*

The defendant was the Medical Health Officer of the city of London, and his monthly salary as such was attached in a

Division Court action in the hands of the city corporation to answer a debt due to the plaintiff. It was claimed by the defendant that \$25 of the salary was exempt from attachment under the Division Court Act, R. S. O. c. 47, s. 125, which provides that "no debt due or accruing due to a mechanic, workman, laborer, servant, clerk, or employee for, or in respect of, his wages or salary, shall be liable to seizure or attachment under this Act, unless such debt exceeds the sum of \$25, and then only to the extent of such excess." No facts were in dispute, and the Division Court Judge determined as a matter of law upon the construction of the above section and of the Public Health Act, 1884, and amending acts, the Municipal Act, 1883, s. 281, and by-law No. 319 of the city of London, that the defendant's salary was not exempt from attachment.

*Held*, that the decision of the Judge could be reviewed upon a motion for prohibition; and

*Held*, that the defendant was an employee within the meaning of R. S. O. c. 47, s. 125, and that his salary to the extent of \$25 was exempt from attachment under that Act.

*G. W. Marsh*, for the defendant.

*Shepley*, for the plaintiff.

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[THE MASTER IN CHAMBERS, 6TH APRIL, 1887.]

PALMATEER v. WEBB.

*Action in Chancery Division—Assizes—Chancery Sittings—Rules 255, 590, 591.*

This was an action in the Chancery Division in which Belleville was named as the place of trial. The pleadings were closed on the 31st January, 1887, and neither party filed a jury notice. The Spring Assizes at Belleville were fixed for the 21st March, 1887, and the Chancery Sittings for the 19th April, 1887. The plaintiff did not serve notice of trial for the Assizes, although the pleadings had been closed for more than six weeks before they began, but served notice for the Chancery Sittings. A motion was made by the defendant to dismiss the action for want of prosecution.

*J. B. Clarke*, for the defendant, contended that the pleadings having been closed six weeks before the commencement of the next sitting of the Court, the action should be dismissed under rule 255. The next sitting of the Court was the Assizes, to which the plaintiff may now by rule 590 take the case down where the action is in the Chancery Division as well as where it is in one of the other Divisions.

*W. H. Blake*, for the plaintiff, contra, contended that under Rule 590 the plaintiff was not obliged to take a Chancery Division action down to the Assizes, but could exercise an option between the Assizes and the Chancery Sittings. This was made especially clear by Rule 591.

THE MASTER IN CHAMBERS held that the plaintiff could not be forced down to the Assizes in a case in the Chancery Division where a Chancery Sittings had been appointed for the place where the venue was laid. Rule 590 was by its terms only permissive, and the expression "Sitting of the Court" in Rule 255 must be taken to refer to the sitting applicable to the Division to which the cause is assigned.

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## NOVA SCOTIA.

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### In the Supreme Court.

#### REGINA v. RUMSEY.

*Bond by creditors' assignee—Liability of sureties—Costs refused the Crown.*

R. being appointed creditors' assignee of an insolvent estate, gave a bond as security for the performance of his duties with the names of T. and R. J. & Co., of which firm he was a member, as sureties. R. had no authority to sign the firm name to the bond, but there was no allegation or proof or anything on the face of the bond to raise an implication that it was signed by T. on any condition or reservation that it should also be signed by R. J. & Co.

*Held*, that T. was liable.

The bond given by the assignee under the Act was to the Crown, and in the Court below judgment was for the plaintiff with costs.

The Court on appeal refused to allow costs to the Crown either of the trial or of the appeal.

MCDONALD, C. J., dissented on the ground that security for costs had been given by the Crown and that this distinguished the case from cases in which costs are neither given to nor allowed against the Crown.

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### REGINA v. WOODWORTH.

*Libel—Attachment for contempt—Laches in moving—Jurisdiction of court.*

The defendant was committed for trial for having published in his paper certain libellous matter concerning M. Shortly after defendant published three other libellous articles concerning M., which were calculated to influence the minds of the people from whom the grand and petit juries would have to be drawn, and thereby prevent a fair and impartial investigation of the charge against him. When the last mentioned libels were published the depositions taken on the former complaint had been returned to the Supreme Court, and were on file therein, and it would be the duty of the presiding judge at the next sitting of the court to submit the matter to the Grand Jury.

*Held*, that the defendant had committed a punishable offence, and that the proceedings were at the time so far pending in the court as to enable it to act summarily by attachment to punish if necessary the offence committed.

The libels complained of were published on the 30th December, 1885, and the 20th January, 1886. The motion for the attachment was not made until March 27th, 1886.

*Held*, notwithstanding the lapse of time, that the rule should be made absolute with costs.

The main object of the application was to prevent further publications of a similar kind, and not to punish for the past offence, otherwise the court would have hesitated to grant the rule.

## THE BANK OF NOVA SCOTIA v. BARSS.

*Motion to dismiss for want of prosecution—Insufficient notice—Costs.*

A motion on behalf of the defendant for judgment for want of prosecution was refused on the ground that the plaintiffs had been restrained from prosecuting the suit at the instance of the defendant.

A rule having been moved for dismissing the motion with costs, the defendant's counsel sought to take advantage of the fact that he had only given two days' notice of his motion instead of a month's notice, and that consequently his notice was insufficient and the plaintiffs were not bound to appear.

*Held*, that the plaintiffs were not bound to take the risk of not appearing, and, although not called upon, were entitled to costs.

## WALKER v. STEWART.

*Non-suit entered by consent—New Trial—Costs.*

The plaintiff's solicitor entered his cause for trial in the County Court, and the plaintiff was notified of the fact and requested to attend, but was unable to do so or to notify his solicitor, on account of illness.

A judgment of non-suit having been entered against the plaintiff under these circumstances with the consent of his solicitor,

*Held*, that the judgment was irregular and must be set aside.

The plaintiff was allowed a new trial on payment of the costs of the day; the other costs to abide the event.

## BOHAKER v. MORSE.

*Married Women's Property Act, 1884—Liability of wife's separate estate for costs—Order for security in excess of statute—Appeal.*

The Married Women's Property Act, 1884, c. 12, s. 16, provides that any judgment recovered by a husband and wife in any suit arising out of or in connection with the wife's separ-

ate property shall enure to her separate benefit, and that any judgment obtained against them (except for her tort) shall bind her separate estate alone, etc.,

In a suit brought by a married woman for an injury to her separate property, the husband, who was insolvent and absent from the province, was joined as a party plaintiff, and an order was obtained requiring the wife to give security for defendant's costs, or to appoint a next friend who should justify.

*Held*, that although there is no appeal from a discretionary order of a judge this should be confined to cases that are purely discretionary, where the discretion has been exercised upon a right principle, and where no question of law is involved; and the order in the present case having been granted under a mistake as to the law respecting the liability of the wife's separate estate for costs, the discretion was wrongly exercised.

*Held*, also, that the order was bad as creating a liability on the part of the husband to pay costs exceeding that imposed by s. 16 of the Act.

*Card v. Weeks*, 6 R. & G. 93, distinguished.

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## MUNICIPALITY OF SHELBURNE v. MARSHALL.

*Bond to municipality for officer—Sureties estopped from setting up want of seals—By-law—Ultra vires.*

The defendants signed their names as sureties to an unexecuted bond, which was to be given when completed by M. as security for the faithful discharge of his duties as clerk and treasurer of the plaintiff municipality. When the sureties signed the bond no seals were attached to it. M. subsequently signed the bond and attached seals, and forwarded the bond to the warden of the municipality.

The bond was taken by the municipality under the authority of a by-law, all similar bonds having been previously taken to the Queen.

*Held*, per WEATHERBE and McDONALD, JJ., that the by-law was not *ultra vires*, and the plaintiff having accepted the

bond as security for the officer, the defendants were estopped from denying their seals.

Per McDONALD, C.J., and RITCHIE, J., that defendants were liable on the instrument as guarantors, having signed it with the knowledge that it was to be given as security.

Per RITCHIE, J., the defendants should have negatived the possibility that the bond was re-acknowledged.

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### BONNETT v. CHESLEY.

*Entry of judgment on award—Discretion of Judge as to costs.*

Judgment was entered for the defendant in the County Court with the general costs in the cause on an award made in his favor by arbitrators. The plaintiff was allowed the costs of certain issues found in his favor. The learned Judge allowed an appeal on the two points; 1st, as to whether plaintiff should have been allowed costs; and 2nd, whether the amount allowed was excessive.

*Held*, dismissing the appeal, that what and how much the Judge should allow was entirely a matter of discretion.

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## NEW BRUNSWICK.

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In the Supreme Court.

SMITH v. CHAPMAN.

*Practice—Excessive damages—Motion for new trial on affidavits—New trial—Omission to subpoena witness—Surprise.*

Affidavits will not be received to shew that the damages are excessive in an action of tort.

A new trial on the ground of surprise refused, where the defendant had omitted to subpoena a material witness because he understood the plaintiff had subpoenaed him, the witness not having attended.



## REGINA v. LONG.

*Indictment—Joinder of offences—Riot and assault—Rev. Stat. c. 147.*

Counts for riot and unlawful assembly, under the Revised Statutes, title xxxix, c. 147 (Consol. Statutes p. 1084) being misdemeanors, may be joined in an indictment with a count for assault.

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## EX PARTE WILSON.

*Dominion Fisheries Act, 31 V. c. 60—Interference with private rights—Harbor of Saint John—British North America Act, 1867, ss. 91, 92.*

Though the charter of the city of Saint John grants the right of fishery in the harbor to the corporation for the benefit of the inhabitants, the Dominion Parliament has the right under the British North America Act, 1867, s. 91, to regulate the times and manner of setting nets.

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## PORTER v. McMAHON.

*Slander—Words actionable per se—Innuendo—Crime committed in a foreign country—Extraditable offence under Treaty of Washington.*

A declaration in slander charged defendant with having spoken of the plaintiff, an unmarried woman, the following words: "J. had a bastard child at the factory, and done away with it; and I can prove it." The factory was in the State of Maine; and the innuendo in the declaration stated the meaning of the words "done away with it," to be that the plaintiff had destroyed the child's life.

*Held*, that the words "done away with it," imputed a criminal offence, and were actionable *per se* without any innuendo.

Murder being an extraditable offence under the Treaty of Washington (1842), the Courts of this country will take notice that it is punishable as a crime in the United States.

## McMANUS v. BLAKENEY.

*Agreement to deliver lumber to be measured by a named surveyor—Survey bills, how far conclusive—Estoppel by conduct.*

A. agreed to cut and deliver to B. a quantity of logs to be measured on the brows by a surveyor named by B. The surveyor delivered a survey bill of the logs to each party. The logs were delivered in a mill-pond, where they became mixed with other logs belonging to B. and with logs belonging to C. In dividing these logs between B. and C., a portion of which were unmarked, B. claimed and was allowed a proportion of the unmarked logs according to his survey bill.

*Held*, in an action by A. against B. for the price of the logs, that B. by naming the surveyor to measure the logs, was not estopped from disputing the correctness of his measurement; and that B.'s claiming by the survey bill in his transaction with C. could not be taken advantage of by A. as an estoppel.

In order to create an estoppel by conduct, the representation must be made with the intention that another party should act upon it, and he must have been induced to do so.

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 ONTARIO.
 

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## High Court of Justice.

## CHANCERY DIVISION.

[BOYD, C., 6TH APRIL, 1887.]

*In re* HUNTLY.

*Land Titles Act, 1885—Trustees—Payment and discharge of mortgage—Title.*

A case stated under s. 76 of the Land Titles Act, 1885, for the opinion of the Court, by the Master of Titles.

W. G. S. and A. T. S. were the executors and trustees under the will of T. S., and as such conveyed to P. certain land in Ontario, part of the estate, and received back a mort-

gage to secure the purchase money. W. G. S. lived in Ontario and A. T. S. in England, and the latter gave the former a general power of attorney to deal with the part of the estate in Ontario.

The will of T. S. gave full power to his trustees to sell and dispose of all real and personal property, made their receipts a discharge to any purchaser, contained provisions for the appointment of trustees to succeed A. T. S. and W. G. S., and directed that none of the powers given by the will should be exercised while there was only one trustee.

P. paid W. G. S. the moneys secured by the mortgage, and W. G. S. on his own behalf and as attorney for A. T. S. executed a statutory discharge of the mortgage, which was duly registered.

On the title to the land so dealt with coming before the Master of Titles, he objected to the validity of the payment by P. of the mortgage moneys to W. G. S., and of the discharge as executed, referring to *In re Bellamy*, 24 Ch. D. 387, and *In re Flower*, 27 Ch. D. 592, and stated a case for the opinion of the Court.

*Held*, that the circumstance of one trustee being abroad justified his delegating to his co-trustee the right to receive money, as was recognized by Bowen, L.J., in *Re Bellamy*.

There was in effect a course of dealing agreed upon between the trustees by which the one resident in Ontario attended to the business there. This was justified by the necessities of the case, and warranted the mortgagor in paying as he did to the one.

The general practice in *Re Flower* is subject to variation if the circumstances are such as to render it imperatively necessary. That case is in advance of earlier decisions, and can hardly be regarded as having settled the law.

R. S. Cassels, for the applicants.

H. C.

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[9TH APRIL, 1887.]

### *In re* MORICE AND RISBRIDGER.

*Vendor and purchaser—R. S. O. c. 109—Provision in deed—Lawful issue.*

A deed made by C. G. (mother) to J. H. G. (daughter), just after her marriage contained the following provision:

"It being hereby declared and agreed that it is intended by this deed to vest in the said J. H. G. a life interest and estate in the said land, and at her decease the same is to go to the lawful issue of the said J. H. G., and to be held by them, their heirs and assigns, in equal shares;" and was executed by both grantor and grantee, but no issue were in existence at the date of the deed. In an application under the Vendor and Purchaser Act, R. S. O. c. 109,

*Held*, that the children of J. H. G. were interested in the grant, and that J. H. G. could not make a good title without all the children joining in the conveyance.

*J. Maclellan*, Q.C., for the vendor.

*D. M. McIntyre*, for the purchaser.

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[PROUDFOOT, J., 10TH MARCH, 1887.]

### HAISLEY v. SOMERS.

*Tax sale—Advertisement—Purchase money—Disadvantageous sale—Notice to owner—Compensation for improvements—R. S. O. c. 180, ss. 109, 150, 155, 159—R. S. O. c. 95, s. 4.*

At a sale of part of a certain lot for taxes, the treasurer who made the sale marked in the sale book the part sold as the south one-tenth, but afterwards gave a certificate for the north one-tenth, and this was finally conveyed to the defendant on 5th December, 1884. The bid was for one-tenth of an acre only.

*Held*, that the above state of facts did not invalidate the tax sale and the title of the defendant to the north one-tenth.

*Held*, also, that neither did the fact that the purchase money was not paid for a week or two after the sale invalidate it.

It appeared that in the advertisement of the sale it was not stated whether the land was patented or unpatented.

*Held*, that R. S. O. c. 180, ss. 150, 155 did not cure this defect.

Again, the part sold, the north one-tenth, was not the least advantageous to the owner, the southern boundary of it running through a house which was on the lot, leaving about four feet on the unsold portion.

*Held*, that on this ground the sale could not be sustained.

Again, though the owner of the land was known, he was not notified, as required by R. S. O. c. 180, s. 109, of the assessment and liability to sell.

*Held*, that this also was an omission which was not cured by R. S. O. c. 180, s. 155.

*Held*, also, that the defendant was entitled under R. S. O. c. 95, s. 4. though not under R. S. O. c. 180, s. 159, to compensation for improvements to the land under mistake of title, and also to be paid the amount paid for taxes, interest and expenses.

*McCullough*, for the plaintiff.

*Hewson*, for the defendant.

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IN CHAMBERS.

[WILSON, C.J., 15TH APRIL, 1887.]

REGINA v. BROWN.

*Criminal proceeding—Evidence on motion for certiorari—Rule 598.*

The defendant, who had been convicted of an offence against the Canada Temperance Act, served a notice upon the convicting magistrate of a motion for a *certiorari* to remove the conviction, and after service issued and served upon the magistrate and informant an appointment and subpoena for their examination before an officer of the Court as upon a pending motion.

*Delamere*, for the magistrate and informant, moved, by way of appeal from the Master in Chambers, for an order setting aside the appointment and subpoena, upon the ground that this was a criminal proceeding and that the practice under the Judicature Act did not apply to it.

*Kappele*, for the defendant, relied upon Rule 598, which provides that "a party to any action or proceeding may, by a writ of subpoena, etc., require the attendance of a witness to be examined before the Court, or before any officer, etc., for the purpose of using his evidence upon any motion, peti-

tion, or other proceeding before the Court or any Judge or judicial officer in Chambers," etc.

WILSON, C.J., held that the proceeding was a criminal one, and that the rule cited did not therefore apply, and set aside the appointment and subpœna with costs.

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[BOYD, C., 22ND APRIL, 1887.]

REGINA v. HALL.

*Canada Temperance Act—Conviction—Adjournment to consider judgment—  
32 & 33 V. c. 31, s. 46—Evidence—Certiorari.*

Upon an information for an offence against the Canada Temperance Act a Police Magistrate heard all the evidence within the proper time, and at the close of the evidence announced in presence of the parties that judgment would be reserved for two weeks from that day, at which appointed time judgment was duly pronounced.

*Held*, that 32 & 33 V. c. 31, s. 46, which is to be read into the Canada Temperance Act by virtue of s. 107, applies only to an adjournment of the hearing or the further hearing of the information or complaint, which is quite a distinct thing from the adjudication or determination of the charge after the hearing is completed.

Justices are not obliged to fix the fine or punishment at the instant of conviction, but may take time either for the purpose of informing themselves as to the legal penalty or the amount proper to be imposed, or taking advice as to the law applicable to the case.

Notwithstanding the adjournment after the close of the hearing for 14 days in order to consider and give judgment, the Police Magistrate had jurisdiction, and the conduct of the proceedings was not even irregular.

*Regina v. French*, 13 O. R. 80, distinguished.

There was an amendment of the original information by changing the date of the offence from the 10th to the 23rd of February, and the parties agreed that the evidence taken should stand for the purposes of the amended charge instead of having a needless repetition of it.

*Held*, that this course was unobjectionable.

The defendant's application for a *certiorari* was refused with costs.

*Walter Read*, for the defendant.

*Aylesworth*, for the magistrate.

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### TAYLOR v. RITCHIE.

*Costs, security for—Costs of former action unpaid.*

An appeal by the plaintiff from an order of Mr. Winchester, in Chambers, staying proceedings till the costs of a former action for the same cause should be paid or until the plaintiff should give security for the costs of this action.

*Tytler*, for the appeal.

*C. J. Holman*, contra.

BOYD, C.—*Re Payne*, 23 Ch. D. 288, lays down the rule that if a suit is dismissed with costs (even for want of prosecution) the same plaintiff cannot proceed in another suit for the same object till the costs of the first action have been paid, or under R. S. O. c. 50, s. 70, till security is given. The mere fact of there being a second action is vexatious—the defendants are twice vexed for the same cause—and the rule is a salutary one. I dismiss the appeal with costs.

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[25TH APRIL, 1887.]

### MCCARTHY v. COOPER.

*Costs—Set-off—Rule 436—Solicitor's lien.*

Under Rule 436 a discretion is allowed as to whether or not there shall be a set-off of costs in the same action where costs are awarded to and against the parties; equitable considerations are allowed to enter into the disposal of the contention, and there is no strict right in the matter.

A direction to set off costs was properly refused under the following circumstances:—The plaintiff succeeded at the trial of an action for specific performance of a contract for the sale

of land, and was given costs up to the trial ; on reference to a Master he failed to shew title, and was ordered to pay the defendant his costs subsequent to the trial, and to repay \$500 of the purchase money which had been paid by the defendant ; the defendant's solicitor asserted a lien upon the sum due by the plaintiff for costs, which could be recovered upon the bond given by him as security for costs, whereas the \$500 could not be recovered against the plaintiff, who was worthless.

*W. H. Blake*, for the plaintiff.

*E. T. English*, for the defendant.

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[THE MASTER IN CHAMBERS, 26TH MARCH, 1887.]

### CANADIAN BANK OF COMMERCE v. MIDDLETON.

*Costs, security for—Issue arising out of garnishment proceedings—Interpleader issue.*

Where one of the parties to an issue arising out of garnishment proceedings is out of the jurisdiction, there is power under Rule 375 to order security for costs ; but

*Semble*, owing to there being no rule in Ontario similar to the English rule 863 of 1883, there is no power to make such an order in an interpleader issue.

*Belmonte v. Aynard*, 4 C. P. D. 352, and *Tomlinson v. Land and Finance Corporation*, 14 Q. B. D. 539, discussed.

*Walter Macdonald*, for the plaintiffs.

*McMichael*, Q. C., for the claimant.

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[25TH APRIL, 1887.]

### TOWN OF PETERBORO v. MIDLAND R. W. CO.

*Pleading—"Not guilty by statute"—Action for specific performance of contract.*

"Not guilty by statute" cannot be pleaded to an action for specific performance of a contract ; and the defence of not guilty irrespective of statutory authority is not admissible under the Judicature Act.

*Watson*, for the plaintiffs.

*Aylesworth*, for the defendants.



[28TH APRIL, 1887.]

## BLACK v. STILLWELL.

*Motion to dismiss action or compel re-examination of party—Irregularity—Costs.*

A motion by the defendant to compel the plaintiff to attend for re-examination at her own expense or to dismiss the action, she having failed to answer questions on her examination for discovery in the action.

*Douglas Armour*, for the plaintiff, argued that the motion could not succeed because the appointment for the examination, the notice of this motion, and the affidavits filed by the defendant upon it were entitled in the Common Pleas Division, whereas the action was in the Queen's Bench Division. The motion must be viewed strictly as it was tantamount to a motion to commit the defendant. The plaintiff was willing to attend for further examination, but she asked that this motion should be dismissed with costs.

*Charles Millar*, for the defendant.

THE MASTER IN CHAMBERS made the order by consent for re-examination of the defendant, but he held that the proceedings on this motion being irregular, the motion could not succeed. He was obliged to look at it strictly and must dismiss the application with costs.

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MANITOBA.

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In the Queen's Bench.

[DUBUC, J.]

REGINA v. COULTER.

*Keeping liquor without license—Conviction—Information—Penalty.*

Magistrates have jurisdiction under "The Manitoba Liquor License Act, 1886" upon a charge under s. 73 of keeping liquor for sale without a licence.

The information upon such a charge did not state that the liquor was intoxicating liquor.

*Held*, that such an allegation was not necessary.

An information was laid in proper form. Upon this a search warrant was issued. Afterwards another information was laid which omitted a necessary allegation. This allegation was however in the summons served upon the defendant.

*Held*, that the second information might be supplemented by the first; and in any case the information would be amended and not quashed.

A charge that the defendant kept liquor for the purpose of selling, or for the purpose of trading, or for the purpose of bartering, is only one offence.

Upon such a charge it is sufficient to allege that the offence was committed at a certain town without specifying the house or building.

Upon conviction for such an offence magistrates have power to award imprisonment for four months in default of payment of the fine imposed.

Evidence as to whether the liquor was intoxicating discussed.

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### WALLBRIDGE v. HALL.

### WALLBRIDGE v. YEOMANS.

*Wrongful seizure by sheriff—No interference with goods—Damage—Instructions by attorney—Interpleader.*

Under executions against B. a sheriff seized goods claimed by the plaintiff. The sheriff did not touch the goods or leave any one in possession, but merely took a list of them, told the plaintiff not to remove them, and took an undertaking from the plaintiff that he would not remove them. The sheriff interpleaded and the execution creditors abandoned. The sheriff then (three or four weeks after the seizure) gave notice of abandonment to the plaintiff.

*Held*, 1. That there was no trespass for which an action would lie.

2. An attorney has no implied authority to give instructions to a sheriff to seize any particular goods.

3. Taking part in interpleader proceedings is not a ratification by the execution creditor of the seizure.

Remarks upon the *bona fides* of a sale made to a hired man given under suspicious circumstances.

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[TAYLOR, J.]

CURRAN v. CAREY.

*Partnership suit—Costs where assets insufficient.*

Usually the costs of a partnership suit are paid out of the assets, that is what remains of the partnership property after payment of debts including the balances due to any of the partners.

When the assets are insufficient for the payment of costs then the deficiency must be borne by the partners in proportion to their share of the profits.

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*In re* ASSINIBOIA ELECTION.

*Order not served—Counsel representing witness—"Sufficient sureties"*

At law an order must be drawn up and served within a reasonable time, otherwise the other party may treat it as abandoned.

But the order will not be set aside on the ground of delay unless the other party's position has been affected by it.

In equity only *ex parte* orders require service.

The common law practice prevails as to service of orders in election cases.

An order was made for the examination of witnesses upon a chamber application. The order was not served but the opposite attorney attended on and took part in the examination.

*Held*, that the depositions might be read.

A witness cannot be represented by counsel, nor can counsel engaged in the case be heard in support of any objection a witness may have to giving evidence.

The expression in the Controverted Election Act "three sufficient sureties," means three sureties, each of whom is sufficient for the whole amount.

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[KILLAM, J.]

### HOPKINS v. BECKET.

*Registered County Court judgment—49 V. c. 35—Retrospective Act.*

No statute prior to 49 V. c. 36 made any land exempt from a judgment registered under the County Courts Act.

A judgment registered before the 49 V. may be enforced after its passage.

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## ONTARIO.

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### Supreme Court of Judicature.

#### COURT OF APPEAL.

[11TH MAY, 1887.]

### LANGDON v. ROBERTSON.

*Leave to Appeal—Time—Counsel.*

Where leave of the Court is necessary for an appeal, application therefor should be made within three months from the judgment to be appealed from; but in a case where, although leave to appeal was necessary, none was obtained, and the appellant gave notice and filed his appeal bond, which was allowed without objection by the respondent,

*Held*, that such an equity was raised in the appellant's favour, by the respondent's not objecting to the allowance of the security, as entitled him to relief after the three months.

The rule laid down in *Sievwright v. Leys*, 9 P. R. 200, is the rule that should be acted upon in regard to extension of time.

Upon an interlocutory application the Court will not hear more than one counsel for any party. •

*J. L. Murphy*, for the appellant.

*Mackelcan*, Q.C., for the respondent.

Q. B. D.]

[10TH MAY, 1887.

### ARSCOTT v. LILLEY.

*Conviction for keeping bawdy house—Release and re-arrest—Action for penalty under 31 Car. II. c. 2, s. 6.*

The judgment of the Court below, 11 O. R. 153, was affirmed on appeal. •

*McCarthy*, Q.C., and *R. M. Meredith*, for the appellant.

*Aylesworth*, for the respondent Lilley.

The respondent Hutchinson in person.

### McKENNA v. McNAMEE.

*Contract—Destruction of subject matter.*

Where an executory contract is entered into respecting property or goods, if the subject matter be destroyed by the act of God, or *vis major* over which neither party has any control, and without either party's default, the parties are relieved.

The defendants, who had had a contract with the Government of B. C. for the performance of a public work, but had forfeited it after a part of the work had been done, agreed with the plaintiffs that the latter should do the remainder of the work under the contract and should receive ninety per cent. of the amount of every estimate issued till the completion of the work. The written instrument embodying the agreement, referred to the contract as an existing one, but the fact was, as was fully known by all the parties, that at the time of making the agreement the contract had been forfeited and the Government had taken possession of the works. No advantage was taken by the defendants; the plaintiff had examined the contract with the Government and understood as

well as the defendants the exact position of affairs ; but all trusted in the possession of certain influence by which they hoped to get back the contract and resume work upon it.

*Held*, affirming the judgment of the Queen's Bench Division (not reported), that the failure to obtain a restoration of the contract destroyed the whole consideration for each party's agreement or undertaking.

*McCarthy*, Q.C., and *Wallace Nesbitt*, for the appellants.  
*Lount*, Q.C., for the respondents.

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C. P. D.]

ARSCOTT v. LILLEY.

*Action against magistrate—Costs—R. S. O. c. 73, s. 19—Objection to appeal—Irregularity.*

The judgment of the Court below, 11 O. R. 285, was affirmed as regards the dismissal of the action ; but it was

*Held*, reversing the judgment of the Court below, that s. 19 of R. S. O. c. 73 has not been repealed by any of the provisions of the Ontario Judicature Act or otherwise, any doubt on the subject having been removed by the re-enactment of s. 19 in the new Revised Statutes of Ontario ; and therefore the dismissal of the action should be with costs to the defendant Lilley, the magistrate, as between solicitor and client.

*Held*, also, that the plaintiff could not object to the appeal as irregular, on the ground that, having been begun by both defendants, it was continued by only one, inasmuch as the plaintiff had availed himself of the appeal for the purpose of bringing on a cross appeal.

Per OSLER, J.A. If there was anything in the objection, it should have been taken by way of substantive motion to strike out the appeal for irregularity.

*McCarthy*, Q.C., and *R. M. Meredith*, for the plaintiff.

*Aylesworth*, for the defendant Lilley.

The defendant Hutchinson in person.

BOYD, C.]

## EASTMAN v. THE BANK OF MONTREAL.

*Banks—Bills and Notes—Collateral securities—"Line of credit"—Assignment—Proof of claims.*

An appeal from the judgment of Boyd, C., 10 O. R. 79, was dismissed by reason of the members of the Court being divided in opinion.

*Per* HAGARTY, C. J. O., and OSLER, J. A. The judgment below should be affirmed.

*Per* BURTON and PATTERSON, JJ. A. The appeal of the plaintiff against the Bank of Montreal, so far as it relates to the character of the debts upon the discounted notes, should be allowed.

*McCarthy*, Q.C., for the appellant.

*Street*, Q.C., for the respondents the Bank of Montreal.

*Gibbons*, for the respondents the Merchants' Bank.

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## High Court of Justice.

### QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 19TH MAY, 1887.]

### REGINA v. HALL.

*Canada Temperance Act—Conviction—Adjournment to consider of judgment—32 & 33 V. c. 31, s. 46—Evidence—Certiorari.*

The decision of Boyd, C., *ante*. p. 255, was affirmed on appeal.

*Walter Read*, for the appeal.

*Aylesworth*, contra.

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[ARMOUR, J., 17TH MAY, 1887.]

### *In re* NORTH VICTORIA DOMINION ELECTION PETITION.

### FEE v. BARRON.

*Election Petition—Presentation and deposit of security—Clerk Court.*

A preliminary objection to an election petition, entitled in the High Court of Justice, Queen's Bench Division, that the presentation and deposit of security (made to the Registrar of the Q. B. D. of the H. C. J.) were not made to the Clerk of the Court, within the meaning of R. S. C. c. 9, s. 9, (c.), was dismissed.

Preliminary objections were filed on behalf of the respondent, one of which was that the security was not deposited with the clerk of the Court having jurisdiction, nor was the petition presented to such clerk.

The petition was presented to and the security deposited with Mr. Cartwright, Registrar of the Queen's Bench Division of the High Court of Justice, the petition being entitled in that Division and Court.

By the Dominion Controverted Elections Act, Revised Statutes of Canada, c. 9, s. 2, (i) the expression "Clerk of the Court" is defined to mean the Clerk of the Crown, Registrar, or Prothonotary, or any officer of the Court prescribed for the purpose in question; (j) the expression "the Court" as respects elections means in Ontario the Court of Appeal for Ontario, or the High Court of Justice for Ontario. S. 9 (c):—"Presentation of a petition shall be made by delivering it at the office of the Clerk of the Court during office hours, or in any other prescribed manner." (e) "The security shall be to the amount of \$1,000, and shall be given by a deposit of money with the Clerk of the Court."

On the 22nd April, 1887, *P. McPhillips*, for the petitioner obtained from Wilson, C. J., an order *nisi* to strike out the preliminary objections or to have them summarily disposed of.

On the 17th May, 1887, *Cameron*, Q.C., and *McPhillips* supported the order *nisi*.

*Lash*, Q.C., shewed cause.

It was agreed to treat the motion as a hearing of the preliminary objections.

*Lash*. By the Ontario Judicature Act, s. 53, "all officers who at the time of the commencement of this Act shall be attached to the Court of Queen's Bench shall be attached to the Queen's Bench Division of the High Court." Mr. Cartwright is not the clerk of the High Court; a clerk might have been appointed, but none has been, and there is no one qualified to receive a petition entitled in the High Court of Justice; a petitioner is not deprived of his right of petitioning, for he may file his petition in the Court of Appeal, where there is no doubt who the clerk is. If the petition is not duly presented and the security duly deposited the petitioner is out of Court; *In re Prescott Election Case*, 9 P. R. 481.



Counsel were not called on for reply.

ARMOUR, J.—It is perfectly plain that the object of the statute is to get the petition into the court, and that the respondent shall have security, and this has been accomplished. The clauses as to the clerk are merely directory. I dismiss the preliminary objections, with costs to the petitioner in any event. Proceedings stayed for eight days.

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### CHANCERY DIVISION.

[BOYD, C., 6TH APRIL, 1887.]

#### McINTOSH v. ROGERS.

*Conditions of sale—No deeds to be produced other than those in vendor's possession—Sale of land.*

By written agreement for the purchase of land it was provided "No title deeds, abstracts, or evidences of title to be required other than those in vendor's possession, nor shall the vendor be required to give a covenant for the production of the same."

*Held*, that under this condition the vendor was relieved from the absolute obligation of making out the title to be good; while if the evidences of title, coupled with the abstract, and it may be the public register, did not disclose and prove a good title, the purchaser was not bound to complete.

*W. W. Fitzgerald*, for the vendor.

*G. W. Marsh*, for the purchaser.

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[25TH MAY, 1887.]

#### *In re* LEWIS AND THORNE.

*Vendor and Purchaser—Petition—Parties.*

A petition under the Vendor and Purchaser Act. The land in question had been sold under a power of sale contained in a will. There were executions in the hands of the sheriff against the lands of one of the persons entitled to a share of the proceeds of the sale, and the question submitted was whether the executions in question were a

charge on the land. The execution creditors were served with the petition and appeared pursuant to notice of its presentation.

*Held*, that it was improper to serve the execution creditors with the petition, and as against them it was dismissed with costs.

*F. E. Hodgins*, for the vendor.

*Watson*, for the purchaser.

*Snelling and John Elliot*, for the execution creditors.

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[6TH MAY, 1887.]

WOODRY v. WOODRY.

*Mortgage—Sale or foreclosure—Lunatic defendant.*

Motion for judgment in an action upon a mortgage for foreclosure.

*F. W. Harcourt*, for a lunatic defendant, asked that the judgment should be for sale instead of foreclosure.

*C. Millar*, for the plaintiff, urged that the defendant should not be allowed to have a sale instead of a foreclosure, except upon payment into Court of the usual deposit of \$80.

BOYD, C., said that a lunatic party was peculiarly under the protection of the Court and in the same position as an infant. According to the practice as to infants laid down in *Bank of Upper Canada v. Scott*, 6 Gr. 451, and *Lawrason v. Fitzgerald*, 9 Gr. 371, the lunatic would be entitled to have a sale without payment in of the deposit. Judgment accordingly.

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[ROBERTSON, J., 29TH APRIL, 1887.]

*In re* WATSON AND WOOD.

*Will, construction of—Restraint on alienation—Invalidity.*

By his will P. T. devised lands as follows: "That T. T. do inherit the same as his property, on the conditions that he never will or shall make away with it by any means, but keep it for his heirs."

*Held*, the condition attached to the devise was invalid, being an absolute and unqualified restraint on alienation.

*Smith v. Faught*, 45 U. C. R. 484, and *In re Winstanley*, 6 O. R. 315, distinguished.

*G. H. Smith*, for the purchaser.

*A. H. Marsh*, for the vendor.

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[18TH MAY, 1887.]

STUART v. GROUGH.

*Receiver—Right of action—Demurrer.*

S. recovered a judgment against S. S., and plaintiff was appointed the receiver in that suit to receive S. S.'s share of his father's estate which he was entitled to under his father's will. The share not being paid over, plaintiff brought action in his own name against the father's executors to recover the amount. The defendants demurred on the ground that the cause of action, if any, was vested in S. S., and that plaintiff had no right to bring the action.

*Held*, that the right of action was in S. S. and not the plaintiff; by his appointment he became entitled to receive the amount, and the defendants the executors, having notice of his appointment, could not safely pay over the money to any other, and if in any case they refused to pay over, the plaintiff should apply for leave to bring an action in S. S.'s name. The plaintiff on receipt of the amount could give a proper discharge of the claim to the executors, but when it became necessary to litigate in order to recover, it should be done in the name of S. S., he being the only person having title to recover at law.

*McGuin v. Fretts*, ante, p. 159, followed.

*Moss*, Q.C., for the demurrer.

*Mackelcan*, Q.C., contra.

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COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 18TH MAY, 1887.]

WAGHORN v. HAWKINS.

*Order made at trial, how signed—Divisions of High Court.*

Where an action in the Queen's Bench or Common Pleas Division of the High Court of Justice is, under Rule 590,

set down for trial at a sittings for trial of actions in the Chancery Division, any order made in such action by the Judge presiding at such sittings should be signed by the officer who acts as Registrar at such sittings, and not by the Registrar of the Division to which the action belongs.

*J. M. Clark*, for the plaintiff.

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### IN CHAMBERS.

[WILSON, C.J., 6TH MAY, 1887.]

#### *In re* MONTAGUE AND THE TOWNSHIP OF ALDBORO.

*Costs—County Court scale—Arbitration—Counsel fees.*

No greater counsel fee than \$25 can be allowed upon the taxation on the County Court scale, of the costs of an arbitration, although the attendance of counsel has been for several days.

*F. E. Hodgins*, for the Township of Aldboro.

*C. J. Holman*, for Montague.

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[BOYD, C., 25TH MAY, 1887.]

#### APPLEMAN v. APPLEMAN.

*Will—Counter-claim—Propounding earlier will—Fraud—Particulars.*

The defendants contested the validity of a will propounded by the plaintiff, and also propounded two earlier wills of the testator, under which, in the event of the last in date being invalidated, he claimed.

*Held*, a proper matter of counter-claim.

*Parton v. Johnson*, 1 P. & D., followed.

A general defence of fraud is admissible in an action to establish a will; but where such a defence was pleaded the defendant was required to give particulars forthwith after the examination of the plaintiff, and in default to be debarred from giving evidence on that issue.

*Browne v. Thomas*, 1 Spinks Ec. and Ad. 31, followed.

*F. W. Hill*, for the plaintiff.

*F. E. Hodgins*, for the defendant.

**NOVA SCOTIA.**

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**In the Supreme Court.****McKENZIE v. BLACKMORE.***Owner of Dog—Liability for damage done—Evidence of scienter.*

In an action brought to recover damages for injuries done by defendant's dog in biting and worrying plaintiff's sheep, the only evidence to prove scienter was of admissions said to have been made by defendant some years previously, and that on one occasion, four or five years previously, defendant's dog had been seen with another dog chasing or following sheep.

The County Court Judge before whom the case was tried having dismissed the action on the ground that there was not sufficient evidence of knowledge on the part of defendant,

*Held*, that there was no ground for disturbing his finding.

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**NEW BRUNSWICK.**

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**In the Supreme Court.****HARNETT v. WRY.**

*County Court Appeal—Grounds available on argument of—Garnishee Act, 45 V. c. 17—Certiorari.*

On an appeal from an order of a County Court Judge, the appellant will be confined to the objections taken in the Court below, as stated in the return.

*Quære*, whether the proceedings under the Garnishee Act, 45 V. c. 17, are the subject of an appeal under the County Courts Act, Consol. Statutes c. 51, and whether they should be brought up by *certiorari*.

## RUSSELL v. BUCKLEY.

*Landlord and tenant—Distress—Breaking outer door of building—Distress after sunset—Irregularity—Costs on appeal.*

Breaking open a tenant's building or house in order to distress for rent renders the distress illegal and not merely irregular.

A distress made after sunset is illegal.

Where a distress is illegal in its inception, trespass lies ; and s. 7 of c. 85, Consol. Statutes, respecting "irregularity" in distraining, is not applicable.

*Myers v. Smith*, 4 Allen 207, not followed.

Costs not allowed on appeal from the County Court, where the Judge had decided on the authority of a case in this Court, which was overruled on the appeal: PALMER, J., dissenting.

## WOODS v. McCANN.

*Sale of goods—Price subject to be reduced—Recovery under count for goods sold and delivered—Sheriff—Fieri facias—Seizure—Sale of Chattels not specified—County Court Appeal—Return—Amendment.*

Where, on the sale of a chattel by the plaintiff to the defendant for \$130, it was agreed that the price should be reduced to \$65, if the defendant produced a deed from the sheriff of the county shewing that he had previously sold the chattel to the defendant under an execution ; the plaintiff may recover the price in an action for goods sold and delivered. It is the defendant's duty to produce the sheriff's deed, if he claims to reduce the price to the lesser sum.

A sheriff, having an execution, went to a mill belonging to the judgment debtor for the purpose of making a seizure, intending to seize all the property there.

*Quære*, whether a shingle-machine which was in the mill at the time, but which was not attached to it, and which the sheriff did not see, and which was not mentioned in the notice of the property offered for sale by the sheriff, passed to the purchaser at the sale.

If the return on an appeal from the decision of a judge of a County Court omits to state any of the grounds taken before the Judge, and intended to be relied on by the appellant, he should apply to have the return amended.

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## GILBERT v. UNION MUTUAL LIFE INSURANCE COMPANY.

*Bill in Equity—Prayer for alternate relief—Answer—Exceptions.*

A bill filed by the executor of G. against a Mutual Life Insurance Co. stated that the defendants were incorporated for the purpose of mutual insurance of each other's lives from a joint fund formed by premiums payable by their respective life policies, and that all surpluses arising from such insurances, after paying current losses and expenses, were to be divided annually among the policy holders *pro rata*, in reduction of the premiums, as the amount of each policy bore to the whole amount of the policies then in force. That in February, 1869, in consideration of a certain premium paid by G., the defendants insured \$4,000 on his life payable on his death; whereby he became a member and partner in the company, and entitled to receive a share of the surpluses made by them during the continuance of the contract. That in February, 1877, G. surrendered his policy to the company, receiving from them in consideration thereof a certain sum as the value thereof. That in April following the defendants gave G. a statement of their financial position shewing their assets and liabilities, surplus and earnings, and representing their condition to be successful; whereupon he, relying upon such representation, agreed to continue his contract and pay the advance premiums according to a statement made by the defendants, and gave them notes for the premium and interest. That after the acceptance of G.'s offer to surrender his policy, he, in good faith, allowed the time for the payment of the annual premium ending in February, 1878, to lapse, of which the defendants took advantage, and repudiated the agreement for the continuance of the contract, claiming that the policy had been forfeited. The bill prayed that it might be declared that the policy was in force, and that the sum of

\$4,000, and G.'s share of all surpluses after deducting the amount of premiums he should have paid since February, 1877, should be paid by the defendants ; or, that they should pay the amount they had offered to pay on the surrender of the policy ; or, that the value of the policy in February, 1877, with all surpluses not allowed to G. should be ascertained, and paid to the plaintiff with interest ; or, that the promissory note given by G. to the defendants in April, 1877, when it was agreed to continue the policy, should be given up ; and that the defendants should make a full discovery of all moneys and notes relating to the contract, received by them from G. ; and that an account should be taken of all surpluses accruing to policy holders in each year while the contract was in force ; and that discovery of the receipts and disbursements of all moneys by the defendants during that time should be made.

One of the interrogatories filed by the plaintiff required the defendants to state the total amount of the surpluses arising from their business transactions for each year between February, 1869, and February, 1877 ; the total amount of policies in force during that time ; the gross earnings of the defendants during that time ; the total amount of death losses paid in each year ; the amount of profits earned in each year after paying death losses and expenses ; and the amount of expenses paid by them in each year during that time. The defendants declined to answer this interrogatory, claiming that they were not bound to do so until it was determined whether the policy was in force at the time of G.'s death. They denied that the agreement for the continuance of the policy was as stated in the bill ; and also denied that they had repudiated any agreement made with G.

On exception to the answer to the above interrogatory, *Held*, on appeal, per ALLEN, C. J., and FRASER, J. 1. That the discovery asked for was material to enable the Court to determine at the hearing whether the defendants had misrepresented their financial condition to G., and thereby induced him to continue his contract of insurance in April, 1877, and to determine whether the plaintiff was entitled to the relief prayed for ; and therefore that the defendants were bound to answer the interrogatory.



2. That the defendants were not bound to answer any interrogatories not founded on charges in the bill.

Per PALMER, J. 1. That a defendant who submits to answer must answer fully, although he might have protected himself from answering by demurrer or plea, unless the discovery is sought vexatiously or oppressively ; or unless it will be burdensome or injurious to the defendant to give it.

2. That the discovery sought in this case was material to prove the plaintiff's case at the hearing ; and that even if the policy was surrendered in February, 1877, G. was a partner in the company, and had an interest in the surpluses earned up to that time, and his executor had a right to the discovery.

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### *In re* TIERNAY.

*Marriage—Evidence of—Presumption—Revocation of will.*

Where a marriage ceremony was performed by a Protestant clergyman in Ireland in 1880, between two persons who intended to be married, but who, for the purpose of concealment, used false names ; and they afterwards lived together in Ireland as man and wife for two years, when they came to this Province and continued so to live together,

*Held*, PALMER, J., dissenting, that in the absence of any evidence as to the law of marriage in Ireland, it would be presumed that the marriage there was lawful, although the parties themselves had doubts about its legality, in consequence of their having used false names and having gone through another marriage ceremony here in 1885.

Per PALMER, J. The evidence did not shew any intention by the parties to contract a legal marriage in Ireland, nor any belief that they had done so:

A will made by the husband in 1884 was not revoked by the marriage ceremony performed in 1885.

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### BAIN v. TRUEMAN.

*Conditional sale of goods—Payment by instalments—Agreement that title shall not pass till payment—Shipment by railway—Bill of lading—Possession of—Conversion—Bills of Sale Act, Consol. Statutes c. 75.*

Plaintiff, a manufacturer of safes at Toronto, agreed to sell a safe to T., paint his name upon it, and send it to him at

St. John by railway ; that it was to be paid for by instalments in two years ; but that no title to it was to pass to T. till the whole price was paid, until which time the safe was to be on hire ; and on default of any of the payments plaintiff was to be at liberty to re-take possession of the safe. T. gave his notes for the price of the safe according to agreement ; his name was painted on the door of it, and the plaintiff sent it to St. John by railway, addressed to T., with a bill of lading or way-bill. There was a covering over the safe, which prevented T.'s name upon it from being seen until the covering was taken off. While the safe remained in the railway warehouse T. transferred it to the defendant, to whom he was indebted, delivering to him the bill of lading or way-bill, and he thereupon paid the freight upon it from Toronto, and took possession of it, not knowing that T.'s name was painted on it. The first note given by T. not having been paid, the plaintiff demanded the safe from the defendant, who refused to give it up, claiming to own it.

*Held*, PALMER, J., dissenting, 1. That even if the painting T.'s name on the safe, and sending it to him, would amount to a representation that it was his property, on which a purchaser from him might act, the defendant, when he took possession of the safe, did not know that T.'s name was on it, and therefore was not induced to purchase it by any representation of the plaintiff (the bill of lading not being in evidence), and that the plaintiff was not estopped from showing that T. had no right to sell it.

2. That the agreement between the plaintiff and T. was not a bill of sale requiring registration.

Per PALMER, J. The painting of T.'s name on the safe and giving him possession of it, was a representation to all the world that it was his property, and estopped the plaintiff from disputing it as against the defendant, who was thereby induced to retain possession of it, and to alter his position with respect to T.

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**MANITOBA**

**In the Queen's Bench.**

[FULL COURT.]

**CUMMINS v. THE TRUSTEES OF THE CONGREGATIONAL CHURCH.**

*Death of Judge after hearing and before judgment—Sale of Church property—C. S. M. c. 50—Purchaser raising obstacle to completion of title—Personal order against trustee for repayment of purchase money—Lien.*

After witnesses had been examined and the case heard, but before judgment, the Judge died. The cause was ordered to be set down for argument before the full court.

Trustees of a church made an agreement for the purchase of three lots. In the agreement they were described as "Trustees of the F. C. Church, Winnipeg;" but there was no provision in it as to the appointment of successors in the trust, nor were any trusts set out. The same trustees made a verbal contract for the sale of an adjoining lot. All the lots were intended to be used as a site for a church.

*Held*, that the provisions of C. S. M. c. 50, applied to the property and that the trustees could not sell save in accordance with the provisions of that act.

After the trustees had contracted to sell and after the purchaser had rescinded the contract because of non-compliance with the act, the trustees applied for legislation confirming the sale. This application was opposed by the purchaser.

*Held*, that the purchaser was nevertheless entitled to insist upon the objection.

After the contract and after payment of part of the purchase money, the purchaser rescinded upon the ground above mentioned, and also because of a misrepresentation made to her by one of the trustees. The other trustees were unaware of the misrepresentation. They did not receive any portion of the purchase money. It was applied in the erection of a church upon other land.

*Held*, that the purchaser was entitled to a personal order for repayment against the offending trustee, and to a lien upon both properties; but not to a personal order against the innocent trustees.

Weight of evidence upon a question of misrepresentation discussed.

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### UNION BANK v. BULMER.

*Partnership—Accommodation note signed by one partner—Renewal with notice.*

One partner is bound by the acts of his co-partner in all acts referable to the partnership trade; but where a man takes a security from one partner in the name of the partnership, in a transaction not in the usual course of trade, he takes such security at his peril.

One partner, without the knowledge of his co-partner, signed a note in the firm's name as accommodation for A. The plaintiffs discounted this note without notice of the irregularity. When the note fell due the plaintiffs were made aware of the facts, but took a renewal signed in the same way. In an action upon the renewal,

*Held*, that the above principle applied, and the plaintiff could not recover.

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[WALLBRIDGE, C.J.]

### *In re* ST. ANDREW'S.

*Election petition—Preliminary objection—Recognizance—Justice of the Peace.*

An election petition was filed and served on 15th January. An order allowing respondent ten days' further time to file preliminary objections "to the petition and proceedings" was made on the 20th January. A statement of preliminary objections was filed on the 26th January, among which was an objection that the recognizance for security for costs was taken before a Justice of the Peace,

*Held*, that such an objection was not a preliminary objection; that the rules were erroneous in so treating it; and that the objection might be taken at any time.

The Election Act declared that "the Judge shall *then* hear the parties upon such objections." The rules limited the time for hearing to five days after the commencement of the time referred to as "then."

*Held*, that this rule was *ultra vires*.

The recognizance was taken before S., who was a commissioner for taking affidavits, and also a Justice of the Peace. It purported to have been taken before S. in his quality of a Justice. As a Justice he had no power to take the recognizance, but as a Commissioner he had.

*Held*, that the recognizance was void.

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### ATTORNEY-GENERAL v. RICHARD.

*Pleading—Allegations of fraud or error—Parties—Fraudulent vendor—Attorney-General—Costs.*

It is not sufficient to allege that a patent was issued through fraud, or in error, or through improvidence, without setting out in what the fraud, or error, or improvidence consisted; nor to allege that it was issued upon the faith of certain statutory declarations which were untrue, without showing what the declarations contained.

The original patentee was made a party to an information to set aside a patent, although the information alleged that he had conveyed the land to his co-defendant. The information charged fraud as against the patentee's vendor but none against himself.

*Held*, that the patentee could not demur for want of equity.

The Attorney-General will not be ordered to pay costs; the Imperial statute 18 & 19 V. c. 90, not being in force in this Province.

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[TAYLOR, J.]

### BALFOUR v. DRUMMOND.

*Postponing trial—Absence of witness—Negligence of solicitor.*

On the 14th August, 1884, the bill was filed.

On the 30th, October, 1884, the bill was amended by adding a large number of parties.

In January, 1886, the case was, or ought to have been, ripe for hearing.

In April, 1886, it was set down for hearing and postponed.

In June, 1886, it was set down and postponed by the plaintiff, the defendant D. being a necessary witness, and having left the province, although subpoenaed.

In September, 1886, it was set down and postponed, D. not having returned.

In January, 1887, it was set down and postponed, D. not having returned, and B., the plaintiff's agent, also a necessary witness, being absent, although subpoenaed; and having neglected to attend upon an appointment to take his evidence *de bene esse*.

On the 31st March, 1887, it was set down and a postponement was refused, although D., and B. were absent, D. having meanwhile been in the Province.

On the 4th April, 1887, the question of costs was argued.

On the 19th April, 1887, the defendants, by leave of the Judge, notified the plaintiffs that unless by this date a decree was agreed to, the Judge would make a decree.

On the 25th April, 1887, a petition was served for leave to set down anew for hearing.

The defendants did not shew the existence of any injury to them by reason of the delay.

*Held*, under all the circumstances set out in the judgment, that leave should be given to set the case down again, upon payment of costs of the day and the petition.

2. The engagements of a witness, coupled with shortness of notice, may form an excuse for non-attendance upon subpoena.

3. The negligence of plaintiff's solicitor in not procuring evidence may form a ground for an extension of time for hearing.

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### NIXON v. LOGIE.

*Specific performance—Deficiency in land—Part taken by railway—Sub-purchasers—Parties.*

On 30th January, 1882, the plaintiff agreed to sell lot 33, described as 128 acres, to the defendant L. Shortly afterwards the defendant L. agreed to sell the same land, described as 111 acres, to another defendant, who agreed to sell it to other defendants. There were in reality about

112½ acres in the lot, and of this 1½ acres were owned by a Railway Company, and used for their track. The agreements were made during a period of great excitement in real estate. After its abatement neither party took any steps to carry out the agreement, beyond the rendering of an account by the plaintiff to the defendant, and a letter threatening proceedings in 1885, and an enquiry by the defendant L. as to the state of the title in 1883.

*Held*, that, under the circumstances, specific performance ought not to be decreed against L. 2. That the proper decree against the sub-purchasers (who had not answered) was to direct a reference to the Master to enquire as to title; in the event of his finding a good title, to take an account of the amount due for purchase money and to fix a day for payment; on payment plaintiff to convey; on default rescission; if title good at time of filing bill, plaintiff's costs to be added to purchase money.

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## MANITOBA INVESTMENT ASSOCIATION v. WATKINS.

*Homestead—Conveyance before recommendation—Estoppel by conduct.*

The defendant C. homesteaded certain land in October, 1880. He was a clerk in plaintiffs' employ, and, being desirous of obtaining a loan from plaintiffs upon the land, conveyed it to defendant W. on 1st January, 1883. At that time he had no recommendation for patent. On the 26th January, 1883, he purchased the land under 42 V. c. 31, s. 34, s-s. 15. On the 27th January W. executed a mortgage to the plaintiffs. C. received the money, made payments on account of interest, asked time for other payments, and the patent issued to C. on the 9th June, 1883, and afterwards W. reconveyed to C., who was in reality always the owner of the land.

Upon a bill to foreclose the mortgage,

*Held*, 1. That the mortgage was not void, for it was made after the land had been purchased from the Crown, and not while it was a homestead.

2. That C. was by his conduct estopped from saying that W. had no title at the date of the mortgage, and from claiming title in himself under the patent.

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[KILLAM, J.]

OSBORNE v. INKSTER.

*Security for costs—Sufficiency, onus as to—Power of Master on reference—Extension of time.*

An order was made directing security to be given, within a certain time, to the satisfaction of the Master.

Plaintiff brought in a bond with one surety who justified in \$400 over his just debts, but said nothing about exemptions. The defendant filed an affidavit impeaching the surety's solvency. The Master disallowed the bond.

*Held*, that the Master had acted properly.

2. That further time should not be given unless upon material sufficiently explaining the delay, etc.

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ONTARIO.

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Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.]

[10TH MAY, 1887]

SMITH v. CITY OF LONDON INSURANCE CO.

*Insurance—Fire—Misdescription of premises—Waiver—Arbitration—Verdict—Statutory conditions—Variation.*

The judgment of the Court below, 11 O. R. 38, was affirmed on appeal.

Robinson, Q.C., and C. Millar, for the appellants.

Osler, Q.C., and Wallace Nesbitt, for the respondent.



Q. B. D. & C. P. D.]

MOXLEY v. CANADA ATLANTIC RAILWAY COMPANY.

(TWO ACTIONS.)

*Railway—Fire from engine—Negligence—Evidence—Withdrawing case from jury.*

In an action for damages for negligence the complaint was that, owing to negligent construction or management, sparks or ignited matter had escaped from an engine of the defendants and caused a fire, which had spread and destroyed fences and trees on the farms of the two plaintiffs.

The evidence did not directly shew the cause of the fire, but it shewed that an engine, No. 4, had passed the place of the fire about an hour and a half before it or the smoke from it was perceived, and that another engine, No. 406, had passed about an hour and a quarter later, or about a quarter of an hour before the smoke was perceived. Engine No. 4 was said to be out of order and was a wood burner, but it was not shewn that there was any defect in No. 406, which was a coal burner, and it was assumed at the trial that it was properly constructed and in good condition. Evidence was given, in the shape of depositions taken before the trial, of two employees of the defendants, to the effect that an engine properly constructed and in good order could not throw dangerous sparks, or sparks which would not be dead before they reached the ground; and one of them said that a greater quantity of fire would escape from a wood than from a coal burner. Two witnesses who were near at the time of the passing of the engines swore that they saw no smoke or fire till after both trains had passed.

It was contended that the probabilities were very much against the fire having been caused by No. 4, the engine which was in bad order, and that, as the case depended altogether upon inferences from circumstantial evidence, there was not a case for the jury. The case was, however, submitted to the jury, and verdicts were found for the two plaintiffs.

*Held*, BURTON, J. A., dissenting, affirming the judgments of the Queen's Bench and Common Pleas Divisions, that

there was evidence from which the jury might infer that engine No. 4 was the cause of the fire; it was a presumption of fact depending on the circumstances of the case, and it was for the jury to fix the weight which should be given to it.

*Per* BURTON, J. A. It was incumbent upon the plaintiffs to furnish evidence not only of negligence, but of its connection with the loss; and this was not done by shewing that the fire broke out an hour or two after engine No. 4 passed, another engine which might have caused it having passed in the meantime; and the Judge ought to have withdrawn the case from the jury upon the ground that there was no evidence in support of the issue which the plaintiffs were bound to establish, fit for them to take into consideration. The part of the evidence of the two employees of the defendants above noted should have been rejected on the ground that it came within the saving of "just exceptions," and also because Judges as well as juries know what is the usual and normal state of things, and that it is a matter of common and universal knowledge that no locomotive worked by steam ever has been or ever can be constructed which can be effectively operated without throwing fire capable of causing such a loss as the present.

*Lount, Q.C., and Chrysler, for the appellants.*

*Osler, Q.C., for the respondents.*

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Ch. D.]

### BELL v. MACKLIN.

*Sale of land—Deficiency—Compensation—Misrepresentations—Rescission—Evidence.*

After conveyance of land by the defendant to the plaintiff, the latter complained that he had been induced to purchase by a misrepresentation of the quantity of land, and he asked to have the contract of sale rescinded or for an abatement of the purchase money. The contract of sale was in writing, and contained no provision for abatement or compensation, and the deed conveyed the precise land which the defendant had agreed to sell.

At the trial, PROUDFOOT, J., pronounced a decree for compensation to the plaintiff for deficiency in the land sold, and the Divisional Court confirmed it.

*Held*, that as a matter of law the award of compensation was, under the circumstances, erroneous; and that upon the evidence the finding of fact by the trial Judge could not be supported, and therefore rescission could not be decreed; HAGARTY, C. J. O., dissenting.

Discussion of the circumstances under which an appellate Court should reverse the decision of the trial Judge upon a question of fact.

The appellant in person.

*W. Cassels*, Q.C., and *H. J. Scott*, Q.C., for the respondents.

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C. P. D.]

## CANADA ATLANTIC R. W. CO. v. TOWNSHIP OF CAMBRIDGE.

*Municipal corporation—By-law for bonus to railway—Assent of electors—Casting vote of clerk—Promulgation—R. S. O. c. 174, ss. 152, 317—36 V. c. 48, s. 248.*

The by-law in question was one to raise upon the credit of the defendant municipality money not required for their ordinary expenditure, and not payable within the same financial year, in order to grant a bonus to the plaintiffs. Upon the by-law being submitted to the electors the ballot votes for and against it were equal, and the clerk of the municipality, who acted as returning officer, after summing up the votes, verbally gave a casting vote in favour of it. This occurred in 1880, and before the enactment of 46 V. c. 18, s. 321.

*Held*, reversing the judgment of the Court below, 11 O. R. 392, that s. 152 of the Municipal Act, R. S. O. c. 174, is not applicable to the case of voting on a by-law; and therefore the clerk's vote was a nullity, and the by-law did not receive the assent of the electors of the municipality, within the meaning of s. 317 of the Act. Such a defect cannot be cured by promulgation of the by-law.

*Per* BURTON, J.A.—The provisions of s. 248 of the Municipal Act of 1873, 36 V. c. 48, do not apply to by-laws for granting bonuses to railways; and the judgment of the Supreme Court of Canada in *Canada Atlantic R. W. Co. v. City of Ottawa*, 12 S. C. R. 377, does not so decide.

J. MacLennan, Q.C.; for the appellants.

McCarthy, Q.C., and Chrysler, for the respondents.

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### WOODRUFF v. McLENNAN.

*Foreign judgment, action upon—Defence—Fraud—False swearing of plaintiff at original trial.*

In an action upon a foreign judgment the defence was that the plaintiff fraudulently misled the foreign Court by swearing to what was untrue to his knowledge at the trial of the original action. The matter in dispute was a claim for extra services in hauling logs for a greater distance than required by a contract between the plaintiff and defendants, and the contest was upon the question whether the services were within the contract or were extra. On this question the evidence of the plaintiff, of one of the defendants, and of one or two other witnesses was given at the trial in the foreign Court, the contract and certain letters were put in, and the Judge's charge to the jury shewed that the whole evidence was fully before the attention of the Court. The verdict in the foreign Court was in favour of the plaintiff, but it was now sought to establish the falsehood of the plaintiff's statements with regard to the extra services.

*Held*, affirming the judgment of the Common Pleas Division (not reported), Burton, J.A., dissenting, that evidence under the defence was properly rejected at the trial; for what the defendants proposed to do was to try over again the very question which was in issue in the original action. The charge of fraud was superadded, but that charge involved the assertion that a falsehood was knowingly stated, and before the question of scienter was reached a conclusion of fact adverse to that arrived at by the Michigan jury would have to be adopted.

*Per* BURTON, J. A.—In admitting evidence under the defence the Court would not be assuming to re-try the issues disposed of in the foreign Court. The finding upon these issues is conclusive and cannot be questioned here, but it can be shewn that the decision arrived at was obtained by fraud practised upon the foreign Court, and that right cannot be defeated because, in order to establish it, it becomes necessary to go into the same evidence as was used on the former trial to sustain or defeat that issue. The issues are not the same, although if the facts now discovered could have been shewn at the former trial they would have secured a different result.

The authority of decisions of the English Court of Appeal, and the case of *Abouloff v. Oppenheimer*, 10 Q. B. D. 295, discussed.

*S. H. Blake*, Q.C., and *Lash*, Q.C., for the appellants.

*Bain*, Q.C., and *Kappele*, for the respondent.

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WILSON, C. J.]

*In re* O'MEARA AND THE CORPORATION OF THE  
CITY OF OTTAWA.

*Municipal Act, 1883, s. 503, s. 497, s. ss. 4. 6—By-law—Sale of fresh meat less than by quarter carcase—Restrictions, &c.—Reasonable accommodation.*

The judgment of the Court below, 11 O. R. 603, was affirmed on appeal.

*McCarthy*, Q. C., and *W. H. P. Clement*, for the appellant.

*J. Maclellan*, Q. C., for the respondents.

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C. C. CARLETON.]

[29TH JUNE, 1887.]

CHAPUT v. ROBERT.

*Penalty—R. S. O. c. 123, s. 11—Action by several plaintiffs—Residence of plaintiffs out of jurisdiction—Demurrer—Misjoinder of defendants.*

An action by several plaintiffs *qui tam* against two defendants for penalties for not registering their partnership under R. S. O. c. 123, of which s. 11 gives the action to any person who may sue.

*Held*, reversing the judgment of the Court below : (1.) That under the above section and the Interpretation Act, an objection to the action being brought in the name of more than one person should not prevail : (2.) That the circumstance that the plaintiffs lived out of the jurisdiction could not defeat their action ; (3) That an objection that the claims against the two defendants were improperly joined in one action was not a ground of demurrer ; and

*Per* OSLER, J.A.—There was no inconvenience or impropriety in joining these two defendants in one action.

*Belcourt*, for the appellants.

*J. Maclellan*, Q.C., for the respondents.

AWARD OF ARBITRATORS]

[1ST FEBRUARY, 1887.

*In re* BUSH AND THE NIAGARA FALLS PARK  
COMMISSIONERS.

*Expropriation of land—48 V. c. 21 (O.)—Compensation—Effect upon part left—Easement—Award.*

The Statute of Ontario 48 V. c. 21 authorized the taking of land for the purposes of a public park, and defined land as including any parcel of land, stream, etc., and any easement in any land. There was no express provision for compensation for lands injuriously affected, the compensation, price, or value mentioned in the Act being always for the land taken. Fourteen acres of an estate of thirty-three acres belonging to B. were taken for the park in 1886. The thirty-three acres were separated by a road from another property owned by B. and leased by him for the purposes of an hotel, for 20 years from February, 1881. The water supply for the hotel was and had been for thirty years derived from springs on the fourteen acres.

*Held*, that, although the statute made no express provision for compensating the owner for the depreciation of the part of his land not taken, it was fair and reasonable to add proportionately to the price of the part taken for the loss of value of the part left when dissociated from the other ; and therefore

the arbitrators acted properly in taking into consideration the injurious effect upon the part not taken, and the deterioration in the value of the whole lot.

Upon the evidence also the Court refused to interfere with the amount of compensation awarded; and the appeal was therefore dismissed, except upon the question of the supply of water for the hotel property, as to which it was

*Held*, that it was an easement which passed to the tenant by the lease, and was land within the meaning of the Act; the fourteen acres might be expropriated leaving the easement to be enjoyed by B. as appurtenant to the hotel property; or the easement might be extinguished, in which case it would be a proper subject for compensation; and as it did not appear upon the material before the Court whether this had been considered or not, the award was referred back to the arbitrators.

*Irving*, Q.C., for the Niagara Falls Park Commissioners.  
*Cattanach* and *H. Symons*, for the land owner.

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## High Court of Justice.

### QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 28TH JUNE, 1887.]

#### *In re* MACFIE v. HUTCHINSON.

*Prohibition—Division Court—Attachment of debts—R. S. O. c. 47, s. 125.*

The decision of Rose, J., in chambers, *ante* p. 243, was reversed on appeal, WILSON, C.J., dissenting, the Court holding that a Medical Health Officer of a municipality is not an employee within the meaning of R. S. O. c. 47, s. 125.

*Finlay*, for the appeal.

*G. W. Marsh*, contra.

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## CHANCERY DIVISION.

[THE DIVISIONAL COURT, 17th JUNE, 1887.]

#### BROWN v. WOOD.

*Trial by jury—Discretion of trial judge—C. L. P. Act, s. 255.*

The trial Judge has by s. 255 of the Common Law Procedure Act a discretion to try any case with or without a jury

as he may think best, and his discretion will not be interfered with by a Divisional Court.

*Read*, Q. C., for the defendant.

*Shepley*, for the plaintiff.

## FRAM v.. FRAM.

*Partition or sale—Dowress as applicant—R. S. O. cc. 55, 101.*

Although some expressions in the Partition Act, R. S. O. c. 101, authorize a person entitled to dower not assigned to apply for partition or sale of the lands in which she is interested, yet the Court may, in its discretion, refuse the application, and leave the dowress to proceed under the Dower Procedure Act, R. S. O. c. 55, or otherwise, to have her dower assigned. The provisions of the two acts must be harmonized.

The application of a dowress for partition or sale of two parcels of land, each held in severalty by a different person, subject to the right of dower, was refused, where the defendant opposed the application and the proposed proceedings were for the benefit of the applicant only.

*Devereux v. Kearns*, 11 P. R. 452, discussed.

*W. R. Meredith*, Q. C., and *R. M. Meredith*, for the plaintiff.

*Hoyles*, for the defendants.

[20TH JUNE, 1887.]

## McKINLEY v. BANNERMAN.

*Motion to Divisional Court—Ground not taken in notice.*

The defendant moved in the Divisional Court against the verdict and judgment at the trial before O'Connor, J., and a jury.

At the trial counsel for defendant had taken certain objections to the Judge's charge, but in the notice of motion to the Divisional Court there was no mention of any such objection.

Boyd, C., said that the Court would follow the practice in England, where motions against verdicts were upon notice



and not by order *nisi*, and would hold the party moving strictly to the terms of his notice of motion; and therefore the court refused to hear argument upon objections to the charge.

*Strathy*, Q. C., for the defendant.

*J. A. McCarthy*, for the plaintiff.

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[22ND JUNE, 1887.]

### FURLONG v. REID.

*Notice of motion, grounds of—Amendment.*

A notice of motion to a Divisional Court against the verdict and judgment at the trial on the ground of non-direction should show how and in what way there was non-direction. The court may allow an amendment of the notice in a proper case; but it declined to assist the defendant by doing so, where the non-direction was not material in view of other facts and findings, and the rule of law invoked by the defendant would have operated against a meritorious claim of the plaintiff.

*Pfeiffer v. Midland R. W. Co.*, 18 Q. B. D. 243, followed.

*Moss*, Q. C. and *Parkes*, for the defendant.

*E. Martin*, Q. C. and *Beazley*, for the plaintiff.

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[BOYD, C., 26th MAY, 1887.]

### *In re* LEWIS AND THORNE.

*Writs of fi. fa. lands—Sale by trustees—Application of purchase money—Vendor and Purchaser.*

Where on a vendor and purchaser application it appeared that two trustees under the will of F. L. had, as such, contracted to sell certain lands to H. D., and that under the provisions of the said will the vendors were directed to sell the

said lands, and after payment of funeral expenses and debts, divide the balance of the proceeds among certain of the children of the testatrix, amongst whom was one D. V. L., and that there were certain executions against the lands of D. V. L. in the hands of the sheriff, issued upon certain judgments obtained against him, whereupon the purchaser objected that the said executions were a charge and incumbrance on the interest in the said lands contracted to be sold of the said D. V. L., and that the vendors were bound to discharge the said executions in order to convey the lands to him, and the vendors submitted the contrary, and that they could make a good title free from incumbrance without payment of the said executions, and that the purchaser was not bound to see to the application of the purchase money.

*Held*, that the writs of execution did not interfere with the rights of trustees to sell so as to carry out the directions of the will, and that as a matter of conveyancing they did not derogate from the right of the trustees to convey the estate indefeasibly, and that the purchaser was not required to see to the application of the purchase money, in view of R. S. O. c. 107, s. 7.

*Held*, also, as to executions against lands coming in after the contract to sell, that they could not affect the devolution of title as between vendor and purchaser.

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[27th May, 1887.]

## BANK OF COMMERCE v. NORTHWOOD.

*Bills and Notes—Agreement with maker—Release of indorser.*

The plaintiffs, the holders of certain promissory notes, entered into an agreement with the maker and certain indorsers to extend the time for the payment of the notes, without the consent or knowledge of the defendant, who was a subsequent indorser of the same notes; but the agreement expressly reserved all right and remedies against the sureties.

*Held*, that this being so, the defendant as surety was not discharged. And also that the reservation of the surety's

rights against those for whom he was surety (that is to say, the maker and the prior indorsers) was necessarily involved in the reservation of the rights and remedies of the holders against him as surety.

The agreement further provided for renewal for six months from time to time till the notes were paid ; but these renewals were assented to by the defendant, who joined therein and was not prejudiced thereby.

*Held*, that this formed no defence for the defendant against the claim on the notes.

The agreement also provided that upon the plaintiffs being satisfied, all securities were to be assigned to one of the principal debtors.

*Held*, that this arrangement, not being absolute but limited to those who were parties to it as between themselves, did not affect the claim of the defendant as surety to the possession of the securities, if he paid the plaintiffs.

*Douglas*, Q. C., for the plaintiffs.

*Pegley*, for the defendant.

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[30TH MAY, 1887.]

*In re* BOLT AND IRON COMPANY.

*Company—Managing director—Remuneration—Breach of trust—Set-off—Winding-up—Assignment.*

By-law 17 of the Company provided that "the Directors and Managing Director shall be paid for their services such sums as the Company may from time to time determine at a general meeting." The only provision made at a general meeting was that which was approved on the 27th January, 1883, in these words: "The salary of the Managing Director was fixed until the 31st day of October next as at the rate of \$4,000 per annum." Beyond the 31st October the company had not exercised its discretion under the by-law. L., the managing director, sought to recover for services rendered as such subsequent to 31st October, 1883.

*Held*, that he could not do so.

The position of L., as managing director, rendering services for which remuneration was given, was not that of a servant hired by the company, but of a working member of the company who got paid for the work he did. The rules as to hiring and notice between master and servant were therefore not applicable, and the measure of the rights of the salaried managing director had to be settled by what was provided in that behalf by the charter and by-laws of the company, and here there was no provision for remuneration after 31st October, 1883.

L. having withdrawn from the moneys of the company a certain sum on the assumption that he was entitled to it in payment of his services after 31st October, 1883 ;

*Held*, that this was breach of trust on his part, and the amount thus withdrawn formed a debt based on breach of trust, recoverable by the liquidator, and as to which no set-off was permissible against any debt due by the company to L. L. was bound to replace the money without any deduction before he could get any dividend from the assets of the company in respect to any other claims he had against it.

*Held*, also, that the fact that L. had assigned his said claim against the company to his wife after the winding-up order had been acted on made no difference, since any such assignment would be subject to all the equities against such claim and against the assignor as a director and trustee of the company's funds in the proceedings under the winding-up order.

*Bain*, Q.C., for the company.

*Falconbridge*, Q.C., contra.

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[FERGUSON, J., 19TH MARCH, 1887.]

THE ONTARIO AND SAULT STE. MARIE R. W.  
CO. v. THE CANADIAN PACIFIC R. W. CO.

*Railway acts, general and special—Inconsistent provisions.*

Where a railway company is incorporated by a special act, and there are provisions in the special act as well as the general Railway Act on the same subject which are inconsis-

tent, if the special act gives in itself a complete rule on the subject, the expression of that rule amounts to an exception of the subject matter of the rule out of the general act.

When the rule given by the special act applies only to a portion of the subject, the special act may apply to one portion and the general act to the other.

The probable intention of the legislature is important in considering a matter of that character.

*S. H. Blake*, Q. C., and *W. Cassels*, Q. C. for the plaintiffs.  
*Robinson*, Q. C. and *Moss*, Q. C. for the defendants.

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[ROSE, J., 1ST JUNE, 1887.]

### McPHAIL v. McINTOSH.

*Will, construction of—General intention in favour of a class—Particular intention in favour of individuals.*

Action for recovery of land.

It appeared that A. McP. in 1826 bought the north half of lot 26, and lived on lot 25 adjoining until his death in 1841.

J. McP., his son, lived on lot 26 from 1826 till October, 1876, when he died.

By will in 1841, A. McP. devised to J. McP. lot 26, but added "he is not to sell or dispose of the said lands nor any timber or wood now growing on the said lot; on the contrary the land is to devolve on the most deserving of his children, according to the discretion of my executors, that is to say, after his own death."

In February, 1869, J. McP. conveyed the north-half of lot 26 to the defendant.

The plaintiff, a son of J. McP., claimed to be entitled under the above will.

The executrix of A. McP. made no selection as to who was the most deserving of his children on whom the land should devolve.

*Held*, that the plaintiff was entitled to judgment, for that J. McP. only took a life estate, and though no selection had been made among the children of A. McP., the Court would carry out the general intention in favour of the class by holding that the estate descended on the twelve children of J. McP., and that the plaintiff, having purchased or obtained a conveyance of six-twelfths of the estate, was entitled to seven out of twelve shares of it.

*Leitch*, for the plaintiff.

*D. B. Maclellan*, Q.C., for the defendant.

(Affirmed by the Divisional Court, 29th June, 1887.)

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## COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 25TH JUNE, 1887.]

### THE CENTRAL BANK OF CANADA v. OSBORNE.

*Counter-claim—Slander—Action on promissory note.*

To an action on a promissory note the defendant L., the indorser, pleaded that by an arrangement made with the plaintiffs, who had discounted the note, it was to be renewed from time to time, and paid out of the proceeds of a certain agency business, in which the defendant O., the maker of the note, and the defendant L. were engaged as partners; that the defendant O. had absconded, and that afterwards the plaintiffs had, by libel and slander of the defendant L., prevented him from securing the continuance of the agency business for himself, whereby he was unable to carry out the arrangement; and he also pleaded a counter-claim against the plaintiffs for the alleged libel and slander.

THE COURT, Rose, J., dissenting, struck out the counter-claim upon an application under Rule 127 (b).

*Per* CAMERON, C. J.—There is a wide range of discretion under Rules 127 (b), 168, and 178. In actions where malice is an essential element and the damages are sentimental, without a legal rule to guide in their measurement, there

is much more injury likely to arise to the cause of justice by allowing such a counter-claim than can possibly spring from the defendants being forced to bring an independent action.

*Per* ROSE, J.—The charge of libel arises out of the circumstances giving rise to the claim and defence. If the facts set up by L. do not constitute a valid answer in law to the claim, the plaintiffs may recover judgment against him when peradventure he is in law and justice entitled to damages against them, exceeding the amount of such claim; but if the facts constitute a defence to the claim, they must be allowed to be shown in evidence, and no good will be achieved by not allowing the counter-claim to stand.

*Lefroy*, for the plaintiffs.

*Ritchie*, Q. C., for the defendant L.

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IN CHAMBERS.

[BOYD, C., 7th JUNE, 1887.]

MILLAR v. CLINE.

*In re* SOLICITOR.

*Solicitor and client—Order for taxation—Taxing officer, powers of—Order for payment over.*

Under the common order for taxation of a solicitor's bill of costs, form 136, O. J. A., a taxing officer has power to investigate and dispose of questions of carelessness, impropriety, and negligence in the conduct of the business to which the bill relates; and the officer's certificate is conclusive as to all matters within his jurisdiction.

Where therefore after action brought upon a bill of costs there has been a taxation under such an order, there is an end to litigation and it only remains to enforce payment of what has been found due, which may be done upon a subsequent application by the solicitor.

The original order for taxation may reserve questions of retainer and negligence in a proper case, but if it does not

the client should not be allowed a double chance of defeating the solicitor's claim, by proceeding to defend the action after the conclusion of the taxation.

*Re Clark*, 9 P. R. 337, and *Macdonald v. Piper*, 10 P. R. 586, distinguished.

*Hoyles*, for the plaintiff.

*Dewart*, for the defendant.

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[ARMOUR, J., 31st May, 1887.]

*In re* SOLICITOR.

*Solicitor and client—Delivery of Bill—Judge of County Court, jurisdiction of.*

A County Court Judge has jurisdiction to order delivery of a bill of costs by a solicitor in matters not in his own Court.

A sale under the power in a mortgage having taken place, the purchase money came to the hands of the solicitor for the mortgagees, who paid himself his costs and remitted the balance to the mortgagees. The mortgagor not being satisfied with the amounts charged by the solicitor for costs, obtained from Judge Bell, Judge of the County Court of the County of Kent, the usual order for delivery of a bill by the solicitor.

*Aylesworth*, on the 27th May, 1887, moved for a writ of prohibition to the learned judge to restrain him from proceeding with the order. He contended that a solicitor is a solicitor of the Supreme Court of Judicature and not a solicitor of the County Court, but practises in the latter Court by virtue of being a solicitor of the Supreme Court. The County Judge therefore had no jurisdiction over the solicitor who was not an officer of his Court. The Attorneys Act which names the County Court Judges as having jurisdiction must be so restricted in its application.

*E. Douglas Armour*, contra. The 40th section of the Attorneys Act gives power to "such court or Judge" to order delivery of a bill by the solicitor, his assignee, or representatives. By reference to the original act, 16 V. c. 175, s. 20, it appears that the phrase "such court or Judge"



includes a county court Judge. In the English act 6 & 7 V. c. 73, s. 37, power is given to the Judges of the Superior Courts of Common Law and the Court of Chancery in cases in their respective Courts to order delivery of bills; but in our act, which is transcribed from the English act, this restrictive portion is omitted, and the jurisdiction given to the Judges in general. It appears also that a County Court Judge may order delivery of a bill by the assignee or personal representative of a solicitor, who might be a layman and in no sense an officer of the County Court. This shows that the jurisdiction given by the act was not intended to be exercised by the County Court Judges solely in matters in their own courts.

ARMOUR, J., 31st May, 1887, held that the County Court Judge had jurisdiction to order delivery of a bill, and refused prohibition.

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[ROBERTSON, J., 7TH JUNE, 1887.]

### MACKAY v. MACFARLANE.

*Action begun without authority—Dismissal—Costs—Procedure after judgment—Creditors.*

An action was brought on behalf of the plaintiffs and all other creditors of V. to obtain from the defendant, the assignee of V. for the benefit of creditors, an account of all moneys received by him from the estate of V., and for payment of what might be found due. Judgment was pronounced in favour of the plaintiffs, directing a reference to take the accounts, and reserving further directions and costs. The judgment was not issued, and after it was pronounced the defendant and the plaintiffs' solicitor both died. The executrix of the defendant obtained from a local Judge a summons to compel the plaintiffs to revive the action, or to dismiss it with costs. On the return of the summons counsel for the plaintiffs stated that they would consent to an order dismissing the action without costs, but if that were not agreed to, that they desired an enlargement to shew that

the plaintiffs had never authorized the bringing of the action, and that they had no knowledge of it until the service upon them of the summons now in question. The local Judge, however, made an order dismissing the action with costs.

*Held*, on appeal, that the local Judge would have been justified in dismissing the action without costs, if it had been shewn to him that it was brought without the authority of the plaintiffs, and that he should have granted an enlargement for that purpose, and if he had after the enlargement been satisfied of the truth of the plaintiffs' statements, he should have discharged the summons; for a party should not be required against his will to continue in his name an action which he never authorized to be begun.

The old Chancery rule that an action can be dismissed on the application of a plaintiff who has not authorized his name to be used, only on payment of costs, is not now in force, but the plaintiff is now entitled to an order to stay the proceedings without payment of costs.

*Reynolds v. Howell*, L. R. 8 Q. B. 398, and *Nurse v. Durnford*, 13 Ch. D. 764, followed.

*Held*, also, that an action of this kind should not have been dismissed after judgment pronounced, for the creditors other than the plaintiffs should not have been deprived of the benefit of the judgment.

*A. H. Marsh*, for the appellants.

*D. W. Saunders*, for the respondent.

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## MANITOBA

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In the Queen's Bench.

[FULL COURT.]

VAN WHORT v. SMITH.

*Chattel mortgage—Mistake in mortgagor's name—Addition of deponent in affidavit.*

Abram V. Becksted executed a chattel mortgage in which his name appeared as Abram B. Becksted. He signed his name correctly.

*Held*, that the mortgage was void as against creditors.

In an affidavit of *bona fides* of a chattel mortgage the addition of the deponent was stated to be a trader. He was not in fact a trader.

*Held*, not to vitiate the mortgage.

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### *In re* SHOAL LAKE ELECTION.

*Election petition—Preliminary objections—Appeal from single judge.*

An appeal will lie against the order of a single Judge allowing preliminary objections, and thereupon dismissing a petition.

This was an appeal from an order made upon a summons to consider certain preliminary objections.

The clauses of the statute (C. S. M. c. 4), principally relied upon by counsel were as follows :

VII. The Court of Queen's Bench of this province shall have jurisdiction over election petitions, and over all proceedings to be had in relation thereto, subject nevertheless to the provisions of this act.

IX. In all proceedings had under the authority of this act, the Judge in term or vacation in Chambers, shall have the same power, jurisdiction, and authority as the Court of Queen's Bench sitting in term, subject always to the provisions of this act.

XI. The various officers of the Court of Queen's Bench shall, with reference to all election petitions, have the same powers and be subject to the same duties and obligations, as if such petition were an ordinary proceeding within the jurisdiction of the Court of Queen's Bench.

XXXIX. Within five days after the service of the petition, as hereinbefore prescribed, or within such further time as any Judge shall grant for that purpose, the respondent may produce in writing any preliminary objections or grounds of insufficiency, which he may have to urge against the peti-

tioner, or against the petition, or against the sureties, or against any further proceedings thereon; he shall in such case, at the same time, file a copy of such objections or grounds for the petitioner.

XL. The Judge shall then hear the parties upon such objections and grounds, and shall decide the same in a summary manner.

There were also various other sections by which "the Court or Judge" was empowered to do certain things.

*Held*, that an appeal would lie against the order of a single Judge allowing preliminary objections, and thereupon dismissing a petition.

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[WALLBRIDGE, C.J.]

*In re* WEST BRANDON ELECTION.

*Election Act—Recognizance under seal—Bond.*

Security for "the costs, charges, and expenses in respect of the election petition" is sufficient without enumerating the various items for which security is required by the statute to be given.

Security was given by an instrument in the form of a recognizance, but executed under seal. It was invalid as a recognizance because taken before a Justice of the Peace.

*Held*, that it could not be supported as a bond.

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[TAYLOR, J.]

CARRUTHERS v. WATEROUS.

*Costs, security for—Delay.*

After defendant had obtained a postponement of the trial, and had applied for and been refused a further postpone-

ment, he applied for security for costs, alleging that he had only learned a few days before moving of the fact of the plaintiff's absence.

*Held*, that the application was not too late.

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[DUBUC, J.]

McROBBIE v. TORRANCÉ.

*Promissory note—Presentment, place of—Demand.*

A note was payable at the O. Bank at P. Before maturity the O. Bank had ceased to do business at P.

*Held*, that an action could be sustained without any demand of payment.

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BROWN v. THE CANADIAN PACIFIC R. W. CO.

*Railway—Pleading—International law—Lex loci solutionis.*

To a declaration in contract against a railway company for loss of luggage, the company, as to \$100 of the claim, pleaded that the luggage was carried under a contract whereby "the baggage liability is limited to wearing apparel not exceeding \$100 in value." Replication that the contract was made in the State of Maine; that by the law of that State plaintiff (for reasons assigned) was not bound by the limitation.

Upon demurrer the replication was *held* bad.

A contract made in one country to be performed in another is governed by the law of the latter jurisdiction.

*Seemle*, where there is a contract with a corporation for carriage through several states, with distinct laws, the law of the state where the corporation has its seat and principal office prevails.

[KILLAM, J.]

*In re* BISHOP ENGRAVING AND PRINTING CO.  
*Ex parte* HOWARD.

*Company—Contributory—Contract to take shares—Evidence.*

To constitute the relationship of shareholder there must be a contract between the company and the individual; but this contract need not be sanctioned by by-law.

An application for fifty shares was made by A. before incorporation. After incorporation he was entered in the books of the company as the holder of fifty shares; acted as a director for two years (which he could not have done unless he held at least five shares); and paid calls (upon what number of shares did not clearly appear).

*Held*, that these circumstances were evidence of the existence of a contract to take shares, and that A. was not entitled to have his name struck from the list of contributories.

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ONTARIO.

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Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.]

[29TH JUNE, 1887.]

DAVIS v. LEWIS.

*Trustees—Power of one to bind others—Easement—Acquiescence.*

The judgment of the Court below, 8 O. R. 1, affirmed.

J. K. Kerr, Q.C., for the appellant.

McClive, for the respondents.

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GOLDSMITH v. THE CITY OF LONDON.

*Municipal corporation—Defective sidewalk—Negligence—Misdirection.*

An appeal by the defendants from the judgment of the Court below, 11 O. R. 26, was dismissed by reason of the Judges of this Court being divided in opinion.

W. R. Meredith, Q.C., for the appellants.

R. M. Meredith, for the respondent.

## MATTHEWS v. THE HAMILTON POWDER CO.

*Master and servant--Negligence—Liability of master for neglect of fellow-servant—Intervention of master.*

Action for damages by the administratrix of M., who was killed by an explosion of defendants' powder mills, caused by a shaker being out of repair. W., a director of the defendants, had some time before the explosion, when the works were idle, given express directions to C., the superintendent and head of the works, to have the shaker repaired before recommencing operations, but C. neglected to attend to it and the repairs were not made. It was not shewn that W. in any way assumed to direct the practical working of the mills or that he had any special knowledge or ability to do so, and there was no suggestion that C. was an incompetent or improper person to employ.

*Held*, reversing the judgment of the Court below, 12 O. R. 58, that the intervention of W. had not taken the case out of the general rule of law that the defendants were not responsible for the negligence of C., who was to be regarded only as a fellow-servant of M.

*Robinson, Q.C., and E. Martin, Q.C., for the appellants.*

*Wallace Nesbitt and J. W. Elliott, for the respondent.*

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C. P. D.]

## INTERNATIONAL WRECKING CO. v. LOBB.

*Appeal—Acting on judgment appealed from—Abandonment—Consent.*

By the judgment of the Common Pleas Division, 11 O. R. 408, delivered on the 6th March, 1886, it was adjudged that the plaintiffs' services alleged in the statement of claim were salvage services, and that they were entitled to be remunerated therefor as such; and that the vessel in question should be sold, one half of the purchase money paid to the plaintiffs, their costs out of the other half, and the residue to the defendants.

On the 5th April, 1886, the plaintiffs gave notice of appeal, their contention being that they were entitled to be paid the full value of their services, which was fixed by agreement at \$4,000.

On the 20th April, 1886, the defendants' solicitor wrote to the plaintiffs' solicitors : "The judgment entitles you to a sale of the vessel and one half of the proceeds, and your costs out of the other half. The water is going out of the canal and it is likely that unless something is done the vessel will be further injured. As your clients have a larger interest in it than ours, we think you should interest yourselves in preventing any injury to the schooner. We shall proceed to have the judgment issued at once in order that the vessel may be offered for sale as soon as possible, as otherwise she will have to lie as she is all season, and will be still further deteriorated." The defendants' solicitor swore that when he wrote this letter he thought that the plaintiffs were not sincerely intending to prosecute their appeal, nothing further having been done in the appeal, and the notice not having been served until the time for doing so had almost expired.

On the 14th June, 1886, the plaintiffs entered judgment, and afterwards took it into the Master's office, where an advertisement was settled, and the vessel was sold for \$700, which was paid into court. At the same time the plaintiffs carried on their appeal proceedings, and on the 27th August, 1886, the defendants served notice of motion to quash the appeal.

*Held*, that a party may appeal from a judgment in his favour, if he thinks it should have been a judgment of a different character, but he must be taken to have abandoned his appeal if he proceeds under the judgment. By the appeal the plaintiffs sought to obtain a judgment *in personam*, while the judgment appealed against gave them a remedy *in rem*; having taken this remedy, they could not be heard to say that it was not the one to which they were entitled. If it had appeared that the letter of the 20th April, 1886, was written for the purpose of leading the opposite party into a false position, or to induce him inadvertently to take a course destructive of his appeal, the plaintiffs might have been relieved from the consequences of their acts; but it did not so appear, and it could not be said that the sale was one made by consent. The appeal was therefore quashed.

*Moss*, Q. C., for the appellants.

*W. Cassels*, Q. C., and *R. Gregory Cox*, for the respondents.



Boyd, C.]

GEMMILL v. GARLAND.

*Copyright—Statement in book—Notice of entry—Variation from statutory form—38 V. c. 88, ss. 9, 17.*

The judgment of Boyd, C., 12 O. R. 139, affirmed.

*W. Cassels, Q.C., and W. H. Walker, for the appellant.*

*Arnoldi, for the respondent.*

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C. C. MIDDLESEX.]

JOHNSTON v. MOODY.

*Attachment of debts—Claimant of moneys attached—Issue—Discretion—Rule 375.*

The plaintiff, after recovering judgment against the defendant upon a money demand, took out an attaching order upon moneys in the hands of the C. Company, which were admittedly not the moneys of the Company, and which the plaintiff swore he was informed and believed belonged to the judgment debtor, but which were claimed by a son of the latter. There was nothing before the Judge of the County Court to support the assertion of the plaintiff, and the examination of the claimant, taken at the instance of the plaintiff, shewed that there was no reason to suppose that the claim was not well founded.

*Held*, that the Judge had under Rule 375 a discretion to direct or refuse to direct the trial of an issue, and that such discretion was properly exercised in refusing to so direct and in rescinding the attaching order.

*Semble*, if the plaintiff had been able to suggest even a plausible ground for supposing that it was the money of the judgment debtor or to cast a suspicion upon the *bona fides* of the claim of the son, it would have been the duty of the Judge to direct an issue if the plaintiff desired it.

*R. M. Meredith, for the appellant.*

*Aylesworth, for the respondent.*

DISTRICT COURT OF THUNDER BAY.]

BANK OF MINNESOTA v. PAGE.

*District Court—Appeal, right of—R. S. O. c. 90, s. 34—Order under Rule 80—45 V. c. 6, s. 4—Motion to High Court—47 V. c. 14, s. 4—Costs, security for—Dismissal of action.*

There is a right of appeal to the Court of Appeal from the judgments of the District Courts of the Provisional Judicial Districts; s. 34 of R. S. O. c. 90 imports that when by the law in force with regard to County Courts, an appeal lies from these Courts to the Court of Appeal, it lies also from the District Courts. An order for leave to sign judgment under Rule 80 is in its nature final and not merely interlocutory, and therefore such an order, if made in a County Court, would be appealable by virtue of 45 V. c. 6, s. 4; and is also appealable when made in a District Court.

47 V. c. 14, s. 4, assumes the existence of the right of appeal from District Courts; and the optional right to move against the verdict in the High Court, provided by s.-s. 5, is not the appeal referred to in the first part of the section, in the words "subject to appeal."

On the 5th November, 1885, an order was made requiring the plaintiff to give security for costs within four weeks, and in default that the action should be dismissed with costs, unless the Court or Judge on special application for that purpose should otherwise order. Within the four weeks the plaintiff took out a summons, with a stay of proceedings, for "further time to perfect security for costs," and on the 10th December, 1885, an order was made extending the time till the 23rd December, 1885, but not providing that the dismissal of the action should be the result of non-compliance with its terms. Security was not furnished within the time so extended, and it was contended that after that the action was dead, and there was no jurisdiction to make an order in it.

*Held*, that the action never became dismissed under either of these orders, and that a motion to dismiss was regular and necessary.

Leave to sign judgment under Rule 80 should not be granted save where the case is clear and free from doubt;

and under the circumstances of this case an order for such leave was reversed.

*Watson*, for the appellant.

*Aylesworth*, for the respondents.

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## High Court of Justice.

### QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 28TH MAY, 1887.]

#### REGINA v. DUNNING.

*Conviction—Weights and Measures Act, 1879—Certiorari—Appeal to Quarter Sessions—Imprisonment—Criminal charge—Evidence of accused—Conviction bad in part.*

The defendant was convicted by two Justices under 42 V. c. 16, s. 41, s-s. 2, amended by 47 V. c. 36, s. 7, of obstructing an assistant inspector of weights and measures in the discharge of his duty, and fined \$100 and costs, to be levied by distress, imprisonment for three months being awarded in default of distress.

The defendant tendered himself as a witness and was rejected, whereupon he appealed to the Quarter Sessions, which sustained the ruling of the Justices and affirmed the conviction.

*Held*, affirming the order of O'Connor, J., in Chambers, *ante*, p. 116, refusing a *certiorari*, that the conviction being affirmed in appeal, *certiorari* was taken away, except for want or excess of jurisdiction, neither of which existed, as the Justices and Quarter Sessions had jurisdiction to say whether the defendant's evidence was admissible or not, and their judgments, even though wrong, were not reviewable by *certiorari*.

*Per* ARMOUR, J.—Even if the judgments could be reviewed, they were right, the offence charged being a crime.

*Held*, also, ARMOUR, J., dissenting, that imprisonment in default of distress was justified by 32 & 33 V. c. 31, s. 62, incorporated in the Weights and Measures Act, 1879, by s. 53 thereof; but that if imprisonment were not so justified, the whole conviction would be bad, there being no power to amend by striking out the award of imprisonment.

*Per* ARMOUR, J.—32 & 33 V. c. 31, s. 62, should be construed only as fixing the duration of the term of imprisonment where the special act provides specifically for some imprisonment without fixing its duration; and, as no imprisonment is expressly imposed by the Weights and Measures Act for the offence charged here, so much of the conviction as awards imprisonment is *ultra vires* and therefore bad; but it is separable from the residue of the conviction, and should be quashed, the residue standing.

*Shepley* and *F. M. Macdougall*, for the defendant.

*W. H. P. Clement*, contra.

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[28TH JUNE, 1887.]

### BALLARD v. STOVER.

*Will, construction of*—"Share and share alike"—"Survivor and survivors."

The testator devised to persons named, their heirs, executors, administrators, and assigns, all his real and personal property, share and share alike, upon trust that they, or the survivors or survivor, should out of the same suitably and well support his wife for life in as comfortable a position as she was then in with him, and he appointed these persons his executors. The plaintiff, the executors, and the other defendants were all nephews and nieces of the testator's, and would have been entitled to share in his estate in case of an intestacy.

*Held*, Armour, J., dissenting, that the trustees were not beneficially entitled, and after the death of the testator's wife the will was satisfied and the estate passed to the plaintiff and those entitled as in case of an intestacy.

*J. B. Clarke*, for the plaintiff.

*Osler*, Q.C., for the defendants.

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### MACGREGOR v. DEFOE.

*Illegal distress for rent—Overholding tenant—Removal of goods.*

The plaintiff overheld and paid rent after term expired. The defendant distrained on his goods on premises six miles

from Toronto for two months arrears of rent, removing the goods to Toronto to impound and sell.

*Held*, that the relation of landlord and tenant subsisted at the time of the distress; and that the removal in question of the goods, unless unnecessary and unreasonable, or malicious, was no ground of action.

*G. T. Blackstock*, for the plaintiff.

*J. E. Robertson*, for the defendants.

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### MACGREGOR v. BISHOP.

*Promissory note—Partial failure of consideration—Parol agreement to reduce face value of note—Endorsement after maturity.*

The defendants purchased stock of C. for \$5,500, and covenanted to pay for same, the deed also providing that part of the amount was to be secured by promissory notes of \$1,100 each. After the last note matured, C. endorsed it *sans recours* to the plaintiff. To an action on the note the defendant pleaded that C. misrepresented the value of the goods, and that before the maturity of the note he agreed to allow a reduction of \$500 from its face value, and that the plaintiff took the note after maturity. The defendants paid \$626.50 into Court, the balance due on the note, with interest. At the trial the plaintiff admitted he claimed to occupy no different position from C. The defendants' evidence showed a verbal agreement to make the reduction of \$500, but there was no memorandum in writing. C. swore he never made the agreement. The learned Judge found that C. had promised to make the reduction, and that the plaintiff stood in same position as C., dismissing the action with costs.

*Held*, right, and that the plaintiff was bound by the verbal agreement.

*A. C. Calt*, for the plaintiff.

*W. Nesbitt*, for the defendant.

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### STANDARD BANK v. DUNHAM.

*Promissory note—Partnership—Change of Partners—Notice—Misdirection.*

D. was in business at M. from February to 1st September, 1886, under the name of D. & Co. He was also in business at

T. with P., under the same name from 1st May to 1st August, 1886, it being agreed between D. & P. that D. should not sign the firm's name to bills and notes. The dissolution of D. & P. was not advertised till 20th August, 1886. For his own purposes and without P.'s knowledge, D. on 11th August signed notes for \$21,000 with the firm's name and gave them to I. The note in question here was one of these, but dated 30th July previously. The plaintiffs, in ignorance of P. being a member of the firm, took the note, without notice of any infirmity, in security for a pre-existing overdue debt. The Judge at the trial charged the jury that the plaintiffs could resort to either for payment.

*Held*, misdirection, there being no such right of election; that the creditor must prove who his debtor was, and the defendants need not prove they were not the debtors.

*Held*, also, that if the note was given before the 1st August the Judge should have asked the jury which firm D. intended to bind; but if it was not given during the partnership, and plaintiffs were ignorant of the firm, or that P. was a member of it, the question was not material.

*Held*, also, that the plaintiffs being ignorant of the firm of D. & Co., or its members, and having had no dealings with it, P. was not liable on the note signed after 1st August, when the dissolution took place, though before 20th August, when the publication of the same was made.

The facts being before them, the Court, instead of ordering a new trial, gave judgment for P., with costs.

*J. K. Kerr*, Q. C., and *John A. Paterson*, for the defendant Park.

*Lash*, Q. C., and *C. J. Holman*, for the plaintiffs.

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## DEAN v. THE ONTARIO COTTON MILLS COMPANY.

*Negligence—Injury to workman—Neglect of superintendent—47 V. c. 39, s. 15, s.-s. 1—49 V. c. 28, s. 3., s.-s. 1—Evidence.*

In the defendants' dye house were a number of vats used for boiling cotton in the process of dyeing. In the course of the plaintiff's employment as a dyer in the defendants' factory it was necessary for him to stand upon the top of one of these vats for the purpose of throwing down the cotton from the

drying box attached to the vat into which the cotton after being boiled was thrown, so that the liquid might drain back into the vat. The cover provided by the defendants consisted of a number of boards; the average was 5 feet, 6 inches, by 19 inches; and the vat was 5 feet in diameter.

About the 3rd December, 1886, the plaintiff complained to the superintendent that these boards were not sufficient in number to cover the vat completely but the defendants did not remedy the defect, and on the 6th December while the plaintiff was at work standing on these boards, one of them slipped endways, and the plaintiff with the board fell into the boiling liquid below and was scalded. The defendants thereafter remedied the defect. Another accident of a similar nature had occurred there two years before.

*Held*, that there was sufficient evidence of negligence on the defendant's part in not having the vat in which the plaintiff sustained the injury securely guarded, in compliance with the Ontario Factory Act, 1884, 47 V. c. 39, s. 15, s.-s. 1, to justify a jury in finding for the plaintiff.

*Held*, also, that, independently of the Factory Act there was evidence of negligence in these defendants entitling the plaintiff to maintain an action under s.-s. 1 of s. 3 of the Workmen's Compensation for Injuries Act, 49 V. c. 28; and that the maxim *volenti non fit injuria* had no application: the facts of this case.

*Thomas v. Quartermaine*, 2 T. L. R. 796, considered and distinguished.

On the argument the court on terms allowed the plaintiff to give in evidence the proclamation bringing into force the Ontario Factory Act.

*Staunton*, for the plaintiff.

*MacKelcan*, Q. C., for the defendants.

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## CANADIAN LOCOMOTIVE CO. v. COPELAND

*Vessel—Cargo—Freight—Consignees.*

A schooner laden with coal in the late autumn of 1883, from S. to K., was damaged and unloaded to repair, in consequence of which the cargo could not be delivered till the spring of 1884, when on tender at K. to the consignees they refused it, disclaiming title thereto, and stating that the consign-

ors or insurers must take it. The master too would not deliver the coal without payment of greater freight than he was entitled to. The coal was, by consent of parties, unloaded on the consignees' wharf, who received it as wharfingers. It was then sold by consent and the consignees bought.

*Held*, that the shipowners were entitled to charge for unloading, selling, and delivering, and to their proper freight charges, although the master had refused to deliver unless paid higher freight, for the consignees refused in any case to accept the coal, either as consignees or as purchasers.

*Osler*, Q.C., for the defendants.

*Britton*, Q.C., for the plaintiffs.

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### HENDERSON v. KILLEY.

*Partnership—Dissolution—Agreement by new firm to pay debts of old—Right of creditors to enforce—Creation of trust.*

K. & M. having carried on business under the name of K. & Co., dissolved partnership, and K. gave M. sixteen promissory notes for \$500 each, with interest, for his share in the business, which was continued by K. K. afterwards, by agreement under seal, formed a partnership with O., to continue until a Joint Stock Company should be formed to take over their assets, and K. by this deed was to transfer to the co-partnership, as his contribution to the capital, all the assets of his business, to be taken at a valuation, subject to the deduction of his liabilities, which were to be assumed by the co-partnership and charged against him. Among K.'s liabilities, known to O., were ten of these notes, which he had endorsed to the plaintiff before they fell due. The new firm paid two of them, with interest on others, and there were negotiations for an extension of time to pay the whole. The company had been formed, and K. had transferred his interest to it. The assets of K. transferred to the new firm were sufficient to pay his liabilities.

*Held*, that though the plaintiff could not have sued upon the deed, not being a party to it, the circumstances established the relationship of trustee and *cestui que trust*, and



entitled the plaintiff through K. as her trustee, to enforce performance of the stipulation in the deed for payment of the notes held by her.

*Osler, Q.C.*, for the plaintiff.

*Robinson, Q.C.* and *MacKelcan, Q.C.*, for the defendants.

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### WINFIELD v. FOWLIE.

*Interpleader—Machinery in mill—Conveyances under R. S. O. c. 104 and c. 102  
—“General words”—Effect of on property adjacent to and used with  
property conveyed—Practice.*

In 1875 A. K. and H. K. entered into partnership as shingle makers for a term of years on equal terms, and for the purposes of the partnership purchased in A. K.'s name a piece of land about 200 feet distant from the Georgian Bay, which was conveyed to him on 1st September, 1876. In the waters of the bay a shingle mill was erected which was connected with the land so purchased by a tramway, which was filled from time to time with sawdust, etc. The mill was so erected for the convenience of floating logs to it. H. K. advanced the money to pay for the mill and machinery. The partnership was never formally dissolved, although H. K. ceased to interest himself in it subsequent to June, 1876.

In June, 1876, A. K. mortgaged the land to J. K. by a mortgage in the statutory form, to secure a sum of money advanced by the mortgagee to him, and H. K. to secure this loan also executed a mortgage of his individual interest as partner in the land. This last mortgage recited the partnership and was given at the request of the mortgagee, who was aware of the existence of the partnership. The mill was in operation until the end of 1882, having been run by different persons in the interval. The land was sold under the power of sale in the mortgages, and with the intention of getting the machinery, was purchased by the defendant, who under authorization removed the machinery. The land was conveyed by the same description to the defendant by J. K. by deed made pursuant to the Short Forms of Conveyances Act, R. S. O. c. 102. H. K. subsequently executed a release of the land to the defendant.

Under an execution against A. K. the machinery was seized by the sheriff after having been loaded on the cars for the defendant.

In an interpleader issue it was

*Held*, O'CONNOR, J., dissenting, that the mill and machinery comprising the goods in question, became part of the realty in such a manner as to pass under the mortgage of the land from A. K. and H. K. to J. K. by virtue of R. S. O. c. 104, s. 4, and by the deed from J. K. to the defendant, under R. S. O. c. 102, s. 4.

Remarks by Armour, J., on the inconvenience of the practice of making the execution creditor the plaintiff in interpleader, where the goods when seized are in the possession of the claimant.

*Lount*, Q.C., for the plaintiff.

*Kean*, for the defendant.

## CHANCERY DIVISION.

[THE DIVISIONAL COURT, 18TH JUNE, 1887.]

### COX v. HAMILTON SEWER PIPE COMPANY.

*The Workmen's Compensation for Injuries Act, 1886—Negligence of superintendent—Notice of action—49 V. c. 28, ss. 3, 7, 10.*

An action for damages for an injury to a workman of the defendants through the negligence of a fellow workman alleged to be, as regarded the plaintiff, in the position of a superintendent.

The solicitors for the plaintiff before action wrote as follows to the defendants :

"We have been consulted by Mr. J. Cox concerning injuries sustained by him while in your employ, by which he lost his left hand.

"We have received instructions to commence an action against you for damages, unless the matter is satisfactorily settled without delay.

"If you intend contesting the suit, kindly let us have the address of your solicitor who will accept service of process your behalf."

*Held*, reversing the decision of Cameron, C. J., that this was sufficient notice of action to satisfy the requirements of 49 V. c. 28, ss. 7, 10.

*Held*, also, that the evidence in this case *prima facie* brought it within s. 3, s-s. 3, and the nonsuit must be set aside and a new trial had.

If while in obedience to orders injury arises through the negligence of the one giving the orders, it is sufficient. No specific order at the time of the injury is requisite. General prior orders suffice.

*Lash*, Q.C., for the plaintiff.

*Osler*, Q.C., for the defendants:

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[29TH JUNE, 1887.

### WELLS v. LINDOP.

*Slander—Qualified privilege—Bad faith—Malice.*

Motion after new trial of the case, reported 13 O. R. 434, the defendant now pleading privilege, and the motion being to set aside the verdict of \$350 for the plaintiff or for a new trial.

*Held*, that though the occasion on which the defamatory words were spoken was one of qualified privilege, yet inasmuch as it appeared that the defendant used the words in bad faith, not believing at the time the statements made by him to be true, the defendant's expressions were in excess of the requirements of the occasion and malicious, and he was not protected.

*Osler*, Q.C., for the plaintiff.

*Aylesworth*, for the defendant.

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### WARNOCK v. KLOEPFER.

*Insolvent—R. S. O. c. 118—48 V. c. 26, s. 2.*

A man may be deemed insolvent in the sense of the Act R. S. O. c. 118, as amended by 48 V. c. 26, s. 2, if he does not pay his way and is unable to meet the current demands

of creditors, and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent.

*Held*, under the circumstances of this case, that a certain assignment of book debts made by J. M. to the defendant was made by him when in insolvent circumstances, and was void as against the plaintiff under the above Act.

*McCarthy*, Q.C., and *G. W. Field*, for the defendants.

*Masson*, Q.C., for the plaintiff.

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### PARKER v. MAXWELL.

*Locatees—Timber license—Free grant—43 V. c. 4 (O.)*

The meaning of the Act 43 V. c. 4 relating to free grants is that all standing pine belongs to the Crown: when cut during the process of actually clearing the land for cultivation, or in order to build and fence on the location, it belongs to the locatee, otherwise when cut it still continues the property of the Crown. The statute, having regard to the usual course of operation by settlers, does not contemplate a locatee reserving trees and leaving them standing or uncut during the process of clearing. Where the clearance is, all are to be removed, and as to all pine in the clearance so removed the Crown waives its rights in favor of the locatee. But it is not competent for the locatee to leave pine uncut upon his clearing with a view of having a timber reserve for future building or fencing purposes, so as thereby to oust the superior title of Her Majesty.

These principles were applied in the present case, in which the plaintiff sued the defendants, who had converted to their own use certain pine trees upon the land which the plaintiff held as locatee, the defendants claiming to have a right to cut the same under a timber license from the Commissioner of Crown Lands.

*Pepler*, for the plaintiff.

*Lount*, Q.C., for the defendants.

(Leave given to appeal.)

# MISSOURI v. DORCHESTER.

*Municipal corporations—Drainage works—46 V. c. 18, ss. 570, 598.*

The township of N., on the petition of seven out of ten property owners, passed a by-law under 46 V. c. 18, s. 570, for construction of a drain, which was to extend through the adjoining township of D., forming one entire scheme of drainage through both townships. The property owners directly affected by the work were thirty-nine in D. and ten in N., and the ratable division of the cost of the work was \$1,345 to be paid by N. and \$5,725 by D.

This action was brought by N. to compel D. to pass a by-law under s. 581 of 46 V. c. 18, to raise its proportion of the fund, which it refused to do.

*Held*, that the case was not one contemplated by s. 570 and following sections, but fell within s. 598, and that the County Council was the proper authority to pass a by-law for the construction of such a drain as that proposed; but apart from that, even under s. 570, in cases where the drainage work extends beyond the limits of one township, a petition by the majority in number of the persons to be benefitted in any part of the two townships would seem to be required, the parts of both townships being considered for the purpose of the act as forming a quasi-municipality for the proper drainage of the particular locality, so that a majority of all that section formed by the combined parts of the two municipalities may ask for, and, if the Council of the originating township thinks proper, obtain the needful relief.

*W. W. Fitzgerald*, for the plaintiffs.

*W. R. Meredith*, Q.C., for the defendants.

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[BOYD, C., 6TH APRIL, 1887.]

# THE CATHEDRAL OF THE HOLY TRINITY v. THE WEST ONTARIO PACIFIC RAILWAY CO.

*Railway Company—Expropriation of lands—Liability to take whole block—  
Right to exercise option after taking possession.*

The plaintiffs were incorporated under 37 V. c. 91 (O.) for the purpose of building a cathedral, and were the owners of

a block of land enclosed in one fence and bounded on three sides by streets, known as the Cathedral or Chapter House Block, upon which they had erected a Chapter House as part of the Cathedral, but for want of funds the other part of the cathedral had not been proceeded with.

The defendants in constructing their railway required for their line and took possession of part of the block, which would cut off a part of the Cathedral when erected, but the plaintiffs under the circumstances declined to sell or convey or arbitrate as to the value of anything less than the whole block.

In an action to compel the railway company to take the whole and desist from their proceedings as to part only, it was

*Held*, that the block of land was set apart for Cathedral purposes, and that it had not by any default of the plaintiffs lost that distinctive ecclesiastical character, and an injunction was granted against the railway company taking a part only, as in *Sparrow v. The Oxford, etc., R. W. Co.*, 2 D. M. & G. 94.

It was contended by the plaintiffs that the defendants having taken possession could not withdraw, but must take the whole block.

*Held*, that the mere going into possession, although a high handed act on the part of the defendants, should not necessarily commit them to the purchase of the whole, and that the defendants should have the option to take the whole, or withdraw and pay all damages and costs sustained by the plaintiffs.

*Semble*. In *Grimshawe v. The Grand Trunk R. W. Co.*, 15 U. C. R. 224, it was thought there was power to withdraw after possession taken; *a fortiori* should that be permissible when the possession is merely of a part, and having reference only to that part, and the proprietor objects to the Company having that part unless on condition of taking the whole.

*Hellmuth*, for the plaintiffs.

*W. R. Meredith*, Q.C., and *Cronyn*, for the defendants.

[30TH JUNE, 1887.]

## PEGG v. HOBSON.

*Mortgage—Action on covenant—Mortgagee becoming owner—Extinguishment.*

In an action on the covenant for payment in a mortgage, for the amount of the deficiency after the exercise of a power of sale, the defendant alleged as a defence that the plaintiff had become the owner of the equity of redemption by transfer from the vendee under the power of sale.

*Held*, on demurrer, that the plaintiff's remedy against the defendant had not been extinguished by his dealings.

*E. B. Brown*, for the plaintiff.

*W. M. Douglas*, for the defendant.

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[FERGUSON, J., 10TH JUNE, 1887.]

## McGEE v. KANE.

*Trial after demurrer—Admissions in defence—Estoppel by conduct—Sale of land under fi. fa.—Advertisement.*

Where the plaintiff sued to recover land and it was objected at the trial that he had not properly proved his title and it appeared that he had proved all the material allegations in his statement of claim, which had previously been held good on demurrer ;

*Held*, that he was entitled to judgment, and that the rule that a party shall not succeed upon proving his pleadings unless the Judge is of the opinion that he should succeed, cannot be applied to a case where the pleading has been held good upon demurrer.

By way of a special-separate defence the defendant set up that one J. K., through whom the plaintiff proved title, was the patentee of the lands, and then went on to allege that he was thereby entitled to a fee simple therein, as trustee for her.

*Held*, that this allegation that J. K. was patentee of the lands could not be made use of by the plaintiff to satisfy any defect in his evidence to prove the case, the burden of which

rested upon him by reason of the pleadings of the defendant, which alleged possession in herself and her trustee as aforesaid.

The defendant also alleged that in certain proceedings theretofore had by the plaintiff for the purpose of selling the lands now claimed under an execution obtained by the plaintiff against her, the plaintiff had asserted that the lands were hers, and that he was therefore now estopped from saying that they were not hers, but that all the time they had belonged to J. K., who had conveyed to him.

*Held*, that no estoppel existed, for fraud was necessary to the existence of estoppel by conduct, and the person to whom the alleged representation was made must have been ignorant of the truth of the matter, whereas the representation relied on here, assuming it to be made, was made by a person who was not ignorant of the truth of the matter, for the defendant must be taken to have known as well as the plaintiff could know, whether or not she was the owner of the land, or what if any, interest she had in it.

In advertising certain property to be sold under writs of execution, the sheriff stated in the advertisement that he had seized and taken in execution the lands (describing them), and that these lands, or the right, title, and interest of the defendant therein, would be offered for sale by him.

*Held*, that this form of advertisement was sufficient, and that it was not necessary for the advertisement to define more narrowly the nature of the estate or interest to be sold.

*Christie*, Q.C., and *O'Gara*, Q.C., for the plaintiff.

*McCarthy*, Q.C., and *Mahon*, for the defendant.

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[6TH JULY, 1887.]

DOWNEY v. DENNIS.

*Trustees—Discretion—Power of sale—Reserved bid.*

Motion for interim injunction restraining trustees under a will from selling certain property without a reserved bid.

The will in question contained the following trust for sale: "And whereas trouble and discontent may arise among my family with regard to the property which I own in Toronto,



on account of its being put out of the power of my trustees to sell and dispose of said property, I hereby order, direct, and fully authorize at and after twenty years of my death, my trustees to whom I have hereinbefore devised my property in Toronto in trust to absolutely sell and dispose of the said property in Toronto to the best advantage, the proceeds thereof to be equally divided between my heirs share and share alike." .

The twenty years having expired, the trustees had now advertised the property to be sold without reserve.

*Held*, that the Court had jurisdiction to enjoin the trustees from selling the property without proper care and endangering the rights and interests of the plaintiffs in any way that is needless, and that the evidence in this case showed that to sell the property without reserve would be to do this, and therefore an injunction must go to restrain the proposed sale without reserve.

*The Attorney-General of Ontario*, for the plaintiffs.

*Lash*, Q.C., and *J. R. Roaf*, for the adult defendants.

*J. Hoskin*, Q.C., for the infant defendants.

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## NOVA SCOTIA.

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In the Supreme Court.

MOFFATT v. McRITCHIE.

*Agistment of cattle—Bill of sale—Hiring, lease, or agreement for sale—R. S. c. 92, s. 3—Laches.*

In an action of trover for a pair of oxen the Judge of a County Court found the following facts :—C. H. D., the owner of the oxen in dispute, delivered them to H. under an agreement that the latter was to have their use for a year or more for their keep. H., pretending to be the owner of the cattle, executed a bill of sale of them to the defendant who

permitted H. to remain in possession. H. afterwards returned the cattle to C. H. D., the owner, who then sold them to the plaintiff, who was a *bona fide* purchaser for value without notice.

*Held*, per McDONALD, C. J., that there being evidence to sustain the findings of the Judge below, and the evidence on the part of the defendant not being of a character to induce the Court to reverse them, the arrangement made by C. H. D. with H. was not a "hiring, lease, or agreement for sale" within the letter or the spirit of the Bills of Sales Act, R. S. c. 92, s. 3.

Per WEATHERBE, J., that, though the evidence for the defendant as to the terms upon which the cattle were held by H. was of a suspicious character, it would have necessitated the granting of a new trial had not the defendant, by permitting the cattle to remain in the possession of the plaintiff for eighteen months after the purchase, caused the latter to alter his position by incurring expenditure in regard to them, and by being prevented from taking steps to secure the return of his money.

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### LEWIS v. DENTON.

*Magistrates' Court—R. S. c. 102, s. 2—Deposit of travelling fees—Appeal—Certiorari—Jurisdiction of County Court.*

R. S. 102, s. 2, provides that in all cases where the defendant does not reside in the county where the summons is issued, it shall be incumbent on the Justice, before issuing the writ, to require the plaintiff to deposit with him a sum equal to ten cents per mile each way of the distance between the residence of the defendant and the place of trial, "and, in case such deposit shall not be actually paid in as aforesaid and endorsed on both original and copy, the said writ and service shall be void."

The plaintiff issued a summons in the magistrates' court against the defendant to recover an amount claimed to be due for goods sold and delivered, but omitted to deposit or to have endorsed on the original and copy of the writ a sufficient amount to cover the defendant's travelling expenses, as

required by the statute. The magistrates admitted that the amount deposited was insufficient, but permitted the plaintiff to cure the deficiency by depositing a further amount, and proceeded with the trial. The defendant made no defence and judgment was given for the plaintiff.

The defendant appealed, and in the County Court application was made on affidavit for judgment in his favor on the ground stated. The application having been refused, the case was tried on its merits and judgment given for the plaintiff. This judgment was not appealed from, but a case was stated by the learned Judge for the opinion of the Court, on the interlocutory application, as to the power of the magistrates to permit the defect in the summons to be cured at the trial.

*Held*, per WEATHERBE, J., that the question of the insufficiency of the amount did not come properly before the County Court Judge on the appeal, but should have been brought up by *certiorari*, while the case was before the magistrates.

Per SMITH, J., that the defendant should have had judgment before the magistrates.

Per McDONALD, C.J., that the summons and all the proceedings before the magistrates were void for non-compliance with the statute, and that the appeal from the void proceedings could not give the County Court Judge jurisdiction to adjudicate on the subject matter of the cause.

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### DAVISON v. MULCAHY.

*Lien for wharfage discharged by tender—Pleading.*

The plaintiff sued for damages for the unlawful detention of certain lumber; the defendant pleaded a lien for wharfage, and the plaintiff replied a tender of an amount sufficient to cover the defendant's claim.

It was contended that the latter plea was insufficient, as there was no payment into Court to satisfy the debt in respect of which the lien was claimed.

*Held*, that the lien was discharged by the tender.

## MUMFORD v. MUMFORD.

*Insurance—Life—Endowment policy—Beneficiaries—Construction of contract—Payment of premiums by insured.*

J. A. M. applied for and obtained a policy of insurance upon his life for the sum of \$2,500, the amount insured under the terms of the policy being made payable to J. A. M. at the end of thirty years, if he should live so long, otherwise to his father, W. B. M., whose name was signed to the application. At the time the insurance was effected J. A. M. was unmarried, but subsequently married the plaintiff, by whom he had issue. All the premiums were paid by J. A. M., and there was no indebtedness on his part to his father. The latter died in June, 1874, and his estate was administered, and the final accounts passed in November, 1877. After the death of his father, J. A. M. had some correspondence with the company with the view of having the policy altered so as to make the amount insured payable to his wife, but the change was not completed, as the company required a release from persons interested in the father's estate, and some of these were infants.

On the death of the insured the defendant, the surviving administratrix of W. B. M., demanded and was paid by the insurance company the amount of the policy, and an action was thereupon brought by the widow and administratrix of J. A. M. to compel the defendant to pay over the money so received, on the ground that the amount belonged to the estate of J. A. M. and not to the estate of his father.

*Held*, that there was a clear contract between J. A. M. and W. B. M. on the one part, and the insurance company on the other, that in the event which had happened, the insurance should be paid to the representatives of W. B. M.; and also that the payment of the premiums by J. A. M. raised no equity in favor of the plaintiff as his representative.

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MAHON v. GANNON.

*Ejectment—Trustee—Legal estate in cestuis que trustent.*

The plaintiff in ejectment claimed under a sheriff's deed to him as trustee of his sister M. and her children. On the

same date on which this deed was executed the plaintiff executed a mortgage of the said lands to C. H. M. B., the condition of which was that if the principal and interest were paid in one year the mortgage should be void. The principal and interest were not paid until after the expiration of the year, when they were paid by M. and an assignment of the mortgage made to her children J. M. and F. M.

Letters of guardianship of the children were granted to the defendant who collected the rents of the property.

*Held*, that the condition of the mortgage not having been fulfilled, in the absence of any reconveyance to the plaintiff, the latter could not maintain ejectment.

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### ELLS v. BLACK.

*Easement—User of way—Damages for obstruction—Reformation of deed—Joinder of parties—Damages—Notice.*

The plaintiff sought to recover damages against the defendant for obstructing him in the use of a way adjoining the plaintiff's property, which he claimed to enjoy by virtue of user by himself and those under whom he claimed for a period of upwards of twenty years. No user as claimed was proved at the trial, but it appeared that the plaintiff had no legal right to use the way as his own nor any license from the owner to do so. It was contended that, admitting this to be so, the plaintiff being in possession of the way or the user thereof could maintain his action against the defendant, who was in no better position, for interrupting him in the user :

*Held*, that the mere user by the plaintiff of the way in common with other persons, in the absence of any legal right, would not enable him to recover damages against defendant for obstructing the way.

The learned judge who presided at the trial was of opinion that one of the deeds on which the plaintiff relied should be reformed because there was evidence that the grantee had bought and paid for the right of way, though no reference to it was made in the deed.

*Held*, that the reformation could not be made without joining the grantor and grantee under the deed, and perhaps others, and that even if the reformation was effected it could not sustain a verdict for damages committed before the deed was reformed and without notice of any agreement as to the right of way.

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## NEW BRUNSWICK.

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### In the Supreme Court.

#### REGINA v. MARSH; *In re* TENNANT.

*Canada Temperance Act—Conviction—Selling and keeping liquor for sale—Identity of offence—Onus of proof.*

T. was convicted on the 16th May, for selling liquor between the 21st January and the 13th April, preceding, contrary to the Canada Temperance Act; he was subsequently convicted for unlawfully keeping liquor for sale between the 14th February and the 24th March in the same year.

*Held*, that the onus was on him to prove that the two charges were identical—that the keeping for sale with which he was charged was, in fact, the selling of which he had been convicted—and that the mere fact that the days between which he was charged with keeping liquor for sale were included within the times stated in the conviction for selling, did not sustain a defence of *autrefois convict*.

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#### REGINA v. MARSH; *In re* DUNPHY.

*Affidavits, how sworn—Crown side.*

Affidavits used in applications on the Crown side of the Court must not be sworn before the prosecutor or his attorney.

## OULTON v. ALLEN.

*Practice—Summons to stay proceedings—Costs not asked for.*

Where a summons to stay proceedings is not moved with costs, they will not be given on granting the application.

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*Ex parte* STATHER.

*Dominion Penitentiary—Conviction by Supreme Court of Nova Scotia—Warrant to commit prisoner—Statement of date of sentence—Habeas Corpus.*

The Judges of the Supreme Court of this Province have the exclusive right to issue writs of *habeas corpus* to enquire into the legality of the imprisonment of a person confined in the Dominion Penitentiary at Dorchester, though he was committed there by the Court of another Province; Tuck, J., dissenting.

S. was tried by the Supreme Court of Nova Scotia in March, 1884, upon an indictment containing counts at common law, charging him as a public officer with making false and fraudulent entries and returns, and with fraudulently destroying public papers, and also containing counts charging similar acts as an offence under 41 V. c. 7, s. 67. He was found guilty and upon the 14th April, 1884, sentenced to four years' imprisonment in the Dorchester Penitentiary upon the counts charging the offence as at common law—judgment being respited upon the other counts. The warrant under which he was committed to the Penitentiary was in the following words :

“Province of Nova Scotia,  
Halifax, SS.

Supreme Court, 188—.

“To the Warden or Governor of the penitentiary at Dorchester in the Province of New Brunswick :

“ Whereas Robert Stather, of Halifax, was, during the March sitting of the Supreme court at Halifax, indicted for making fraudulent entries and fraudulent returns, and was

found guilty upon said indictment, and thereupon sentenced by the court to be imprisoned at hard labor in the Penitentiary at Dorchester for the space of four years.

"Now, therefore, these are to require and command you to receive the said Robert Stather into your custody, and him to detain in the said penitentiary for the said period of four years in conformity with the terms of his sentence, and for which this shall be your sufficient warrant.

"Dated at Halifax this 14th day of April, A.D. 1884.

S. H. HOLMES,

[L. S.] ,

*Cler. Cur."*

The Penitentiary Act, 46 V. c. 37, directs that a copy of the sentence taken from the minutes of the Court by which the prisoner was tried, certified by the Judge or the clerk of the Court, shall be delivered to the warden of the penitentiary with any prisoner committed to his custody.

*Held*, per ALLEN, C.J., WETMORE, PALMER, and FRASER, JJ., that the warrant under which S. was committed to the penitentiary was not a compliance with the statute and did not authorize the warden of the penitentiary to detain S.

Per ALLEN, C.J., WETMORE and FRASER, JJ., that as the warrant did not state the day the prisoner was sentenced, the time when his term of imprisonment commenced and would expire was uncertain, and the warrant therefore defective.

Per PALMER, J., that the warrant did not shew that S. was convicted of any crime, the mere "making of fraudulent entries and fraudulent returns," as alleged in the warrant, being no offence at common law or by statute, and that his imprisonment was therefore illegal.

Per KING, J. 1. That as the Penitentiary Act did not require the offence to be mentioned in the warrant to commit the prisoner, the omission of such a statement did not render it void—it being the warrant of a Superior Court. 2. That it should be presumed, in the absence of anything to the contrary, that the facts existed which made the acts charged a criminal offence. 3. That the omission to state the date of the sentence in the warrant of commitment was only an irregularity, and did not render the warrant void.



**NORTH WEST TERRITORIES****In the Supreme Court.**

[IN BANC, JUNE, 1887.]

**DICKIE v. DUNN.***Sale of chattel—Implied warranty—Evidence.*

A warranty of title will be implied on a sale of a specific chattel in the possession of the vendor at the time of sale.

*Morley v. Attenborough*, 3 Ex. 500, distinguished.

*Brown v. Cockburn*, 37 U. C. R. 602, followed.

*Held*, also, that in this case there was evidence to support the finding of the trial Judge that the defendant, the vendor of the chattels in question, had admitted the title of another thereto.

**REGINA v. O'KELL.**

*North-West Territories Act—Intoxicating liquor—Knowledge—Evidence—Certiorari.*

Motion for a certiorari to remove a conviction of the defendant for having in his possession a quantity of intoxicating liquor, without the special permission in writing of the Lieutenant-Governor of the North-West Territories, contrary to the North-West Territories Act, on the grounds:

1. That there was no evidence that the liquor found was intoxicating.

2. That if the liquor was in fact intoxicating there was no evidence that the defendant knew it, but on the contrary there was evidence that he did not know it.

*Held*, that, as the section under which the defendant was charged did not require that he should knowingly have intoxicating liquor in his possession, it was not necessary for the prosecution to allege or prove a scienter; nor was it a defence that the defendant had no knowledge of the intoxicating character of the liquor; it would be necessary for him to shew that, after careful investigation and inquiry, he honestly believed that the liquor in question was not intoxicating. There was some evidence before the convicting magistrates both to shew the intoxicating character of the liquor and the knowledge of the defendant, and whether their conclusion was right or not, it could not be reviewed on this application.

## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

C. P. D.]

[29TH JUNE, 1887.

## CULVERWELL v. BIRNEY.

*Sale of land—Commission of agent—Offer to purchase—Conditional acceptance—Inability of purchaser to carry out offer—Sale to another person pending negotiations.*

The case made by the plaintiff on the pleadings was that he was employed to procure an offer for the purchase or exchange of three blocks of land owned by the defendants; that he procured from one R. an offer for sale and exchange at the price of \$97,000, which he submitted to, and which was accepted by the defendants, on the 10th September, 1884, whereupon he became entitled to a commission at the rate of one and a half per cent. on the price.

The evidence shewed that the alleged acceptance by the defendants on the 10th September was in fact only an acceptance conditional on R. agreeing to a variation of the terms of his offer. At this time R. was out of the country; the plaintiff, however, agreed on behalf of R. to the variation proposed by the defendants, but he had no instructions to do so, and it was admitted that his doing so was not effectual without ratification by R. R. returned shortly afterwards and on the 18th September, 1884, signed a ratification of the plaintiff's acceptance, but upon the evidence it was doubtful whether this was ever communicated to the defendants. Before this, however, the defendants, being pressed for money by a mortgagee of one of the properties, had arranged a sale of it to one S. at a price \$8,000 less than it was valued at in the offer of R., part of the consideration given by S. being some of the very lands offered by R. in exchange, of which it appeared that S. and not R. had the control. By a subsequent arrangement the defendants' other two properties were sold to R. The defendants and S. came together through the negotiations arising out of R.'s offer.

*Held*, that as between R. and the defendants the matter had never passed beyond the stage of negotiations, and R.'s offer was not one that he could carry out, and therefore the plaintiff was not entitled to commission as upon the offer of R., or alleged contract of sale made with him; neither was he entitled to anything on the footing of his agreement, or *quantum meruit*, by way of commission on the sales that were ultimately made.

The judgment of the Common Pleas Division, 11 O. R. 265, reversed.

*Wallace Nesbitt*, for the appellants.

*J. K. Kerr*, Q.C., and *J. A. Paterson*, for the respondent.

C. C. VICTORIA.]

[10TH MAY, 1887.]

### NORTHCOTE v. BRUNKER.

*Intoxicating liquor—Sale to habitual drunkard—Notice to inn-keeper—R. S. O. c. 181, s. 90.*

R. S. O. c. 181, s. 90, provides that the husband, wife, etc., of any person who has the habit of drinking intoxicating liquor to excess may give notice in writing, signed by him or her, to any person licensed to sell, or who sells, or is reputed to sell, intoxicating liquor of any kind, not to deliver intoxicating liquor to the person having such habit; and if after such notice the person notified suffers to be delivered any such liquor to the person having such habit, the person giving the notice may, in an action for personal wrong, recover such sum as may be assessed for damages.

The plaintiff wrote to the defendant as follows: "Sir:—I hereby forbid you, or any one in your house, giving my husband, William Northcote, any liquor of any kind from this day, the 20th of May, 1885, and oblige me,

MRS. H. NORTHCOTE."

In an action in the County Court of Victoria under the above section for damages for supplying the plaintiff's husband with intoxicating liquor after this notice, the County Judge held (1) that the expression in the letter, "any liquor of any kind" was sufficient to satisfy the section; (2) that

the notice was insufficient, because it did not contain a statement that the defendant's husband was a person who had the habit of drinking intoxicating liquor to excess.

The jury found that the husband was an habitual drunkard and that intoxicating liquor had been supplied to him after notice, and the evidence shewed that the defendant knew the husband well and the reason of giving the notice.

On appeal the Judges of this Court were divided in opinion:

HAGARTY, C. J. O., and OSLER, J. A., were of opinion that the notice was insufficient in view of the omission to state that the plaintiff's husband was a person who had the habit of drinking, etc., Hagarty, C. J. O., expressing no opinion, and OSLER, J. A., doubting as to the other point.

BURTON and PATTERSON, JJ. A., held that the notice was sufficient, having regard to both points.

*Hudspeth*, Q.C., for the appellant.

*D. J. McIntyre*, for the respondent.

## High Court of Justice.

### CHANCERY DIVISION.

[THE DIVISIONAL COURT, 24TH JUNE, 1887.]

#### NORMAN v. HOPE.

*Replevin—Action against sheriff for taking insufficient bond—Damages recoverable therein—R. S. O. c. 53, s. 11—R. S. O. c. 1, s. 8, s.-s. 18.*

The judgment of Armour, J., reported, 13 O. R. 556, affirmed.

*Lash*, Q.C., for the defendant.

*T. Langton*, for the plaintiff.

[5th JULY, 1887.]

#### REGINA v. BRIERLY.

*Bigamy—R. S. C. c. 161, s. 4—Second marriage contracted abroad by British subject resident in Canada—Ultra vires—Evidence—Proof of foreign law—Proof of second marriage.*

*Held*, that R. S. C. c. 161, s. 4., which enacts that every one who, being married, marries any other person during the

life of the former husband or wife, whether the second marriage takes place in Canada or elsewhere, is guilty of felony, provided the person who contracts such second marriage is a subject of Her Majesty resident in Canada and leaving the same with intent to commit the offence, is not *ultra vires* of the Dominion Legislature, either as being repugnant to Imperial legislation, or on any other grounds.

*Per* BOYD, C. This statutory law is nearly half a century old, it has been confirmed by the courts, passed upon more than once by competent Colonial legislatures, and ratified by the express sanction of the Imperial Parliament and Her Majesty in person.

In order to prove the second marriage, which took place in Michigan, the evidence of the officiating minister was tendered, who showed that during the last twenty-five years he had solemnized hundreds of marriages, that he was a clergyman of the Methodist Church, that he understood the laws of Michigan relating to marriage, that he had been all the while resident in Michigan, that he had had communications with the Secretary of State regarding these laws, and that this so called second marriage was solemnized by him in Michigan according to the marriage laws of that state.

*Held*, that this evidence was admissible in proof of the validity of the second marriage, and was sufficient proof of the same, even assuming that such ought not to have been presumed.

*Per* BOYD, C. In the case of a second marriage it is not essential to prove the foreign law in the case of British subjects such as were in question in this case.

*W. R. Meredith*, Q.C., for the prisoner.

*J. R. Cartwright*, for the Provincial Government.

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### CAMERON v. CAMERON.

*Misrepresentation—Bona fides—Actual fraud—Conveyance executed—Rescission—Cancellation.*

H. D. C. agreed in writing with C. C. on January 17th, 1882, to sell to him lots 37 and 39 for \$5,450, payable \$1,791 on the delivery of the deed and upon the title to lot 37 being

found satisfactory to C. C. or his solicitor, and upon a quit claim deed of Lot 39 being delivered; the balance to be secured by mortgage; sale to be completed within 30 days, otherwise the deposit of \$25 to be forfeited. H. D. C., *bona fide* believing such to be the case, represented to C. C., at the time of the sale that a patent from the Crown had issued for lot 37, and relying on this representation H. D. C. entered into the agreement, and afterwards verbally agreed to sell lot 37 at a large advance to one R. On February 10th, 1882, the conveyance was executed, the bulk of the purchase money, \$4,025, having been paid prior thereto in cash, a promissory note being taken for the balance in lieu of a mortgage. It afterwards appeared that no patent had ever issued to lot 37, and notwithstanding the efforts of H. D. C. and C. C. it was not until April 25th, 1883, that the department at length issued a patent, and then only to four chains of the lot, leaving ninety links outstanding. In February, 1883, H. D. C. had told C. C. that he would not keep the property, that by reason of no patent having issued R. had withdrawn from his offer, and he demanded his money back with his actual expenses incurred. C. C. refused to cancel the sale and H. D. C. now took these proceedings to have the sale rescinded and the deed delivered up to be cancelled.

*Held*, that there having been no actual fraud and the deed of conveyance having been executed, the plaintiff could not have the relief sought for.

*Wilde v. Gibson*, 1 H. L. C. 605, *Brownlee v. Campbell*, 5 Ap. Cas. 925, and *Hart v. Swaine*, 7 Ch. D. 42, considered.

*McCarthy*, Q.C., for the plaintiffs.

*Moss*, Q.C., and *Witherspoon*, for the defendants.

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[FERGUSON, J., 13th June, 1887.]

### MOOERS v. GOODERHAM.

*Sale of goods—Action for price—Breach of implied warranty—Acceptance—Caveat emptor—Return of goods—Rescission of contract—Damages.*

The plaintiffs sold a cargo of rye to the defendants to be delivered at a future time at the defendants' dock in Toronto.

At the time of its delivery it was inspected by an inspector employed by the defendants and pronounced by him to be sound so far as he could inspect it. Subsequently as it was being unloaded into the defendants' elevator it was found to be damaged. In an action for the price the defendants set up an implied warranty that the rye would be sound and merchantable and a breach thereof. The plaintiffs contended that there was an acceptance of the rye and that as there was an opportunity for inspection at Toronto the maxim *caveat emptor* applied. The defendants contended that as there was no opportunity to inspect at the time of the contract and no subsequent waiver, the opportunity in Toronto was immaterial, being long after the contract of sale.

*Held*, that there was an implied promise on the part of the plaintiffs that the commodity delivered would be saleable or merchantable under the description "rye," and that the maxim *caveat emptor* did not apply and that there was a breach of the warranty contained by implication in the contract.

*Jones v. Just*, L. R. 3 Q. B. 197, followed.

The breach of a warranty of a specified chattel does not entitle the purchaser to return the chattel and rescind the contract and is no defence to an action by the seller for the price, but evidence may be given of the breach of the warranty in reduction of damages.

*Walkem*, Q.C., and *J. B. Walkem*, for the plaintiffs.

*T. G. Blackstock* and *T. P. Galt*, for the defendants.

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[ROSE, J., 19TH MARCH, 1887.]

### MCGILLIVRAY v. RODD.

*Illegal distress—No rent reserved—2 W. & M. sess. 1 c. 5., s. 5—Double value.*

In an action for illegal distress, in which the learned Judge who tried the case found that the plaintiff occupied the premises in question under an agreement with the defendant by the terms of which no rent was payable by the plaintiff to the defendant, and that the distress was therefore illegal, the plaintiff's counsel asked for double the value of the goods as damages under 2 W. & M. sess. 1, c. 5, s. 5.

*Held*, that s. 5 of the statute by reference to s. 2 does not extend to a holding of land where there is no *rent reserved*, and that the plaintiff was not entitled to double value.

J. A. McGillivray, for the plaintiff.

D. J. McIntyre, for the defendant.

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## COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 26TH MAY, 1887.]

### CLARKSON v. STIRLING.

*Bankruptcy and insolvency—Preference—Evidence.*

On the 19th December, 1885, a transfer of certain book debts, etc., was made by the firm of B. & Co., in pursuance of the terms of a contract therefor, entered into on the 16th of August, 1884, between the firm and the defendant, whereby in consideration of the defendant lending the firm \$15,000, which was to be repaid at any time after six months' notice, with interest in the meantime at ten per cent., the firm was to employ the defendant as clerk at a salary of \$2,000 a year. The firm subsequently made an assignment for the benefit of creditors to the plaintiff, who sought to set aside the contract on the ground that it gave, or had the effect of giving, the defendant a preference over the other creditors, and that at the time of the transfer the firm was insolvent and unable to pay its debts in full.

*Held*, on the evidence, that the firm was not insolvent at the time the agreement was entered into, and that the agreement was valid.

J. MacLennan, Q.C., for the plaintiff.

George Kerr and J. M. Duggan, for the defendant.

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[25TH JUNE, 1887.]

### BATES v. CANADIAN PACIFIC RAILWAY CO.

*Railway—Defective construction—Negligence—42 V. c. 9, s. 25 (D.), applicability of.*

The road-bed of the defendants' railway was on an embankment about fifteen feet high, built on the sloping side of a rock, which sloped into a muskeg or small lake, the em-



bankment being made by the side of the rock being filled in with loose sand, which had no cohesion, and without any retaining wall to keep the sand from slipping. The sand slipped off the side of the rock into the muskeg; and the train on which the plaintiff was travelling on arriving at the place in question was thrown into the cavity caused by the sand so slipping, whereby the train took fire and the plaintiff's luggage was burnt. This part of the road had been in existence about seven years, and had been built by contractors under the Government before the defendants acquired the road; and it was not shown that the defendants had any notice or knowledge of any defect.

By s. 25 of 42 V. c. 9, which is headed "Working of the Railway," it is enacted that the trains shall be started and run at regular hours, etc., and shall furnish accommodation for transportation of goods and passengers, etc., such goods and passengers to be taken, transferred, and discharged at from and to such places on the due payment of the due toll, freight, or fares, etc.; and the party aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or its servants.

The defendants gave the plaintiff a ticket at a reduced rate, on which was printed a condition relieving the company from liabilities beyond \$100.

*Held*, ROSE, J., dissenting, that s. 25 only applied to negligence in the management, etc., of the train, and not to defective construction; and therefore the defendants under the circumstances could avail themselves of the condition.

*Per* ROSE, J., that there was, and *per* CAMERON, C. J., there was not evidence of negligence to go to the jury.

*Osler*, Q.C., and *Wallace Nesbitt*, for the plaintiff.

*Robinson*, Q.C., and *Watson*, for the defendants.

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### CARR v. FIRE INSURANCE ASSOCIATION.

*Insurance—Fire—14 Geo. III c. 78, s. 83—Application to Ontario—Notice by first mortgagee to rebuild.*

A mortgage of certain land was made by T. H. C. and B. H. C. to D., which contained a covenant to insure. A second

mortgage was made by the same parties to the Bank of Toronto for securing a large indebtedness to the bank, which also contained a covenant to insure. At the time of the first mortgage there was an insurance for \$1,400, which was allowed to lapse. On the bank discovering this the manager procured T. H. C. to effect an insurance, advancing the amount to pay the premium, and charging T. H. C.'s account with the amount, and discounted a note made by T. H. C. and endorsed by B. H. C., the plaintiff herein, to cover the same. The policy was to T. H. C. alone, and was; on saw-mill, \$400; on fixed and movable machinery, shafting, gearing, etc., \$1,000; on boiler and connections, \$100; on engine and connections, \$500; loss, if any, payable to the bank. On a fire occurring and the property being burnt, D. required the insurance company to expend the insurance moneys, as far as they would go, in rebuilding the insured premises.

*Held*, doubting, but following *Stimson v. Pennock*, 14 Gr. 604, that the 14 Geo. III. c. 78, s. 83, was not merely of local application, but extended to this Province; and that it applied to a case like the present one; but

*Per* CAMERON, C. J.—It only applied to the amount insured on the building, and did not extend to a distinct insurance on fixtures or machinery.

*Per* ROSE, J.—It covered the fixtures or machinery, etc.

*McCarthy*, Q.C., and *Pepler*, for the plaintiff.

*Strathy*, Q.C., for the defendants.



## DOMINION LOAN AND SAVINGS CO. v. KILROY.

*Husband and wife—Separate business—Property of wife.*

K. about six years before the trial of the action had failed in business and become insolvent. The plaintiffs recovered a judgment against him in respect of a debt contracted before his failure. About three years afterwards he made an arrangement with a wholesale firm to supply goods to his wife upon her own credit and responsibility. The wife had no capital of her own. The business was managed solely by the husband under a power of attorney from the wife, who took no part whatever in the same, and it was at first carried on in premises owned by K., subject to a mortgage, for which she

did not pay or agree to pay rent, but subsequently in premises leased by the wife. These goods were sold and further goods from time to time purchased. The plaintiffs having seized the goods under an execution issued on their judgment against K.,

*Held*, ROSE, J., doubting, that the goods were the property of the wife and not of the husband.

*Osler*, Q.C., for the plaintiffs.

*Moss*, Q.C., for the defendant.

[GALT, J., 29TH JUNE, 1887.]

### CLAYTON v. McCONNELL.

#### *Building Contract—Termination of*

The defendant refused to pay the full amount due according to the terms of a building contract, and caused the plaintiffs delay in not having the joists ready at the proper time for the plaintiffs' use, and when asked for more money the defendant told the plaintiffs to go on with their work, or if they would not go on to leave the building.

*Held*, that the plaintiffs were entitled to consider the contract at an end and to receive any balance that might be due them.

*J. R. Roaf*, for the plaintiffs.

*Lash*, Q.C. for the defendant.

[ROSE, J., 26TH MAY, 1887.]

### DOMINION BANK v. COWAN.

#### *Bankruptcy and Insolvency—"Unable to pay debts in full"—"Insolvent circumstances."*

There is no difference or greater meaning to be given to the words "Unable to pay his debts in full" than to "insolvent circumstances," but both expressions refer to the same financial condition, that is, a condition in which a debtor is placed when he has not sufficient property subject to execution to pay all his debts, if sold under legal process at a sale fairly and reasonably conducted.

The fact that all the assets are either mortgaged or under warehouse receipts is not alone sufficient to render a debtor insolvent.

*R. McGee*, for the plaintiffs.

*G. T. Blackstock*, for the defendant.

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## THE BANK OF MONTREAL v. STEWART.

*Action for possession of land—Mortgage—Foreclosure—Trust—Statute of limitations*

The plaintiffs claimed the possession of certain land under a final order of foreclosure obtained on a mortgage made to the plaintiffs by W. S., a brother of the defendant. The defendant set up that W. S. held the land merely as trustee for him and that he was entitled to the land under the trust, and also by the statute of limitations.

*Held*, that the evidence failed to establish the defendant's contention, and that the plaintiffs were entitled to recover.

*Hudspeth*, Q.C., for the plaintiffs.

*Lount*, Q.C., and *T. Stewart*, for the defendants.

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## REEVE v. THOMPSON.

*Landlord and tenant—Notice to quit—Action for possession.*

In July, 1880, M. conveyed the land in question to the plaintiff. At the time of the conveyance the defendant was tenant from year to year, under M., of lands which included the land in question under a tenancy in force since 1868. The defendant had no knowledge of the conveyance to the plaintiff at the time it was made. In December, 1880, the plaintiff executed what purported to be a statutory lease of the lands in question. The habendum was "during the term of the occupancy as tenant of the lessee of (the defendant) of the lands leased to him; the said term to be computed from the 2nd July, 1880, and from thenceforth next ensuing and fully to be complete and ended, as soon as the said lessee shall vacate the said premises, or cease to reside thereon."

The rent reserved was twenty cents, payable on the 1st July, 1880, in each and every year. The defendant continued to pay rent to M., and never was called upon to attorn or to pay rent to the plaintiff, and received no notice to quit from M. prior to action brought, and no demand of possession from the plaintiff until about the commencement of this action. In 1886 the plaintiff and defendant had a dispute about the plaintiff's boundary line, but the defendant did not dispute the plaintiff's title. The defendant claimed that the conveyance to the plaintiff did not affect his rights under his lease. The plaintiff, claiming that he was entitled to the possession of the land in question, brought an action therefor against the defendant.

*Held*, that the defendant was entitled to the possession until he received proper notice to quit.

*Walkem*, Q.C., for the plaintiff.

*McGuire*, Q.C., for the defendant.

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[O'CONNOR, J., 9TH JUNE, 1887.]

### REGINA v. COLLINS.

*Canada Temperance Act—One justice in summons, charge laid before two—Waiver—Computation of time.*

The summons for an offence under the Canada Temperance Act stated that the defendant was charged with the offence before one justice. The information in fact was taken before two justices, one of whom issued the summons. The defendant appeared on the summons when the two justices were present, and raised no objection; and the defendant was tried and convicted.

*Held*, no objection could now be raised.

S. 46 of the act provides that the hearing may be adjourned to a certain time and place, but no such adjournment shall be for more than one week.

*Held*, that the week must be computed as seven days, exclusive of the day of adjournment.

*Masten*, for the defendant.

*Aylesworth*, contra.

## FAWCETT v. WINTERS.

*Referee—Report, effect of—Reasonable and probable cause—Evidence.*

The report of a referee is equivalent to the verdict of a jury. It should state the referee's conclusions, but not necessarily the reasons for his findings.

The referee found that there was a want of reasonable and probable cause for the defendant proceeding criminally against the plaintiff. It was objected that this was a finding of law and not of fact. The referee was a barrister.

*Held*, that this was equivalent to a verdict for the plaintiff rendered by a jury under instructions by a judge of what would be evidence of want of reasonable and probable cause; and on the evidence the finding could not be interfered with.

*C. J. Holman and Birney*, for the defendant.

*H. J. Scott, Q.C.*, for the plaintiff.

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[ROBERTSON, J., 23RD MAY, 1887.]

*In re* CLARK AND THE TOWNSHIP OF HOWARD.

*Drainage by-law—Assessing land benefitted—Alteration of assessments.*

A by-law was passed to provide for the repairing and cleaning of a drain constructed under a prior by-law, and to make the assessments more equitable. The engineer was limited in making his assessments to the lands only which were included in the original by-law. In his report he stated that great injustice would be inflicted by his limited instructions being carried out, and that a large area of land, which would be benefitted by the work, would escape assessment. The council, notwithstanding, passed the by-law in the limited form. There was an appeal to the court of revision against the assessments, and the court altered some of the assessments by deducting amounts therefrom and placing the amounts thus deducted on other assessments, without making a *pro rata* variation on all the assessments.

*Held*, that the by-law was bad and must be quashed.

*M. Wilson*, for the applicant.

*Pegley*, for the Township.

## IN CHAMBERS.

[WILSON, C. J., 27TH APRIL, 1887.]

## REGINA v. McAULAY.

*Indians—Selling liquor to—Sale by wife—Service on wife—Conviction of husband—Jurisdiction of Indian agent.*

An information for selling liquor to certain Indians, giving their names, but without describing them as of any particular tribe or locality, was laid by R., of the township of Rama, before D. M., "an Indian agent by royal authority duly appointed," and alleged that the defendant, and Fanny, his wife, or one of them, did on, etc., sell, etc., to the said Indians spirituous liquors, contrary to the statute, etc. The summons issued thereon described D. M. as Indian agent, and showed it was issued at Rama township. It was directed to the defendant and his wife, who were described as of the township of Rama, and was served personally on the wife, and a copy left with her at their usual place of abode for the husband. This was proved by an affidavit of service. The inquiry was held at Rama before D. M. as Indian agent, and he subscribed the different depositions as Indian agent of the Chippewas of Rama, and *ex officio* justice of the peace. The conviction was that on, etc., "at Rama Indian Reserve in the township of Rama," the defendant is convicted before D. M., Indian agent for the Chippewas of Rama, and *ex officio* justice, a J. P. for the purpose, and under the Indian act of 1880, for that he did on, etc., at the township of Rama unlawfully sell to certain Indians, to wit, (naming them) intoxicating liquor, to wit, whiskey, etc. The warrant of commitment recited that the conviction was before D. M., an Indian agent of the county of Ontario. The liquor was sold at the defendant's hotel in the township of Rama by the defendant's wife, the husband being away at the time and for some time afterwards. He stated he knew nothing of the summons having been issued or of the proceedings thereon and never authorized any one to act for him. There was nothing said to D. M. to shew why the defendant was not present at the inquiry, and D. M. had no reason whatever to believe that it was other than a case of neglect or refusal to attend.

*Held*, that the service was regularly made and duly proved before the Indian agent, and that he was justified in proceeding to investigate the charge and that the act of the wife was in law that of the husband, and that he could be convicted therefor.

*Quære*, whether D. M.'s appointment was as Indian agent of the Chippewas of Rama, or for the County of Ontario; but the latter might include the township and so give him jurisdiction; but in any event the conviction could not be supported, for it did not appear that the Indians to whom the liquor was sold were Indians over whom the agent had any jurisdiction, for it did not appear that they were Chippewa Indians, Indians residing in the township, or even in the county.

The discharge of the defendant was therefore ordered and so far as necessary, and as there was power to so order, no action was to be brought against the Indian agent.

*George Bell*, for the motion.

*Aylesworth*, contra.

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[BOYD, C., 28TH JUNE, 1887.]

*In re* DENNIS, DOWNEY v. DENNIS.

*Will—Devise—Sale by trustees directed if wished by majority of heirs—  
Consent of majority—Application by minority for partition.*

J. C. died in 1867, having by his will provided as follows: "Whereas trouble . . . may arise among my family with regard to the property . . . on account of its being put out of the power of my trustees to sell or dispose of the property, I hereby order, direct, and fully authorize at and after twenty years after my death my trustees . . . to absolutely sell and dispose of my said property in Toronto to the best advantage, provided only that it be the wish of a majority of my heirs who may then be living to do so and not otherwise, etc." In 1887 a meeting of a large majority of those interested was held and it was decided to sell by public auction.



On an application by the plaintiffs, who were trustees for one of the heirs and represented only one-sixth share of the property, for the usual order for partition and sale, which was resisted by a majority of the heirs,

*Held*, that the land in question was vested in the trustees on the express trust to sell at the end of twenty years from the testator's death, provided a majority of the heirs were in favor of a sale, which was proved, and that the jurisdiction to partition was ousted.

*J. Maclellan*, Q.C., for the plaintiffs.

*Lash*, Q.C., and *J. R. Roaf*, for the defendants.

*John Hoskin*, Q.C., for the infants.

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[ARMOUR, J., 21st May, 1887.]

*In re* HOWLEY v. YOUNG.

*Prohibition—Division Court—Reservation of judgment—Delivery after day fixed—Right to bring new action.*

In an action in the First Division Court of the County of Haldimand it was announced by the Judge at the close of the trial that Judgment would be postponed for four weeks, at the expiry of which it would be delivered in writing at the clerk's office in presence of the parties, according to the Division Court Act, R. S. O. c. 47, s. 106. Judgment was not given on the day fixed, and not till after the time within which a new trial might have been moved for had expired, and when it was given it was without formal notice to the defendant, against whom it was.

Prohibition was granted to restrain execution, but without costs, as the plaintiff was not at fault.

*Quære*, whether the matters between the parties had become finally determined, or whether it was open to the plaintiff to begin another action.

*V. Mackenzie*, Q.C., for the defendant.

*C. J. Holman*, for the plaintiff.

## NOVA SCOTIA.

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## In the Supreme Court.

## BATES v. CRAYTHORNE.

*Counter-claim—County Court—Plea to Jurisdiction—Amendment.*

In an action brought in the County Court on an arbitrator's award, to recover the amount of the award, the defendant counter-claimed, besides other items, for the sum of \$400, being the value of a machine which he alleged to have been wrongfully converted by the plaintiff. The plaintiff replied to the counter-claim, among other things, that it was beyond the jurisdiction of the court which, in cases of tort, was limited to \$200. The Judge permitted the defendant to amend his counter-claim so as to bring it within the jurisdiction of the court, and gave judgment in his favor for the excess over the amount found to be due the plaintiff.

*Held*, per JAMES, J., that the County Court judge was authorized to give the defendant the benefit of his counter-claim to the extent of his jurisdiction over the plaintiff's claim, but that having given relief to the defendant beyond the amount of his jurisdiction the appeal must be allowed.

*Per* RITCHIE and McDONALD, JJ., that after the filing of a plea objecting to the counter-claim as beyond the jurisdiction of the Court, the County Court judge had no jurisdiction to amend it by reducing it to an amount within the jurisdiction of the Court, the County Court Act, R. S. c. 105, s. 25, only permitting such amendment to be made in the absence of a plea to the jurisdiction.

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## McDOUGALL v. GRIFFIN.

*Execution—Irregularity—Subsequent regular execution.—Costs.*

On the 16th October, 1881, the plaintiff recovered judgment against the defendant, and on the 3rd October, 1885, issued an execution for the amount, describing the judgment as of the 18th July, 1885. Finding his mistake, he directed the sheriff to return the execution as not satisfied, which was

done, but not until a levy had been made on the defendant's goods. The plaintiff then issued a second execution correctly following the judgment, and under the second execution the goods were sold.

The defendant applied to set aside the first and second executions and all proceedings of the sheriff thereunder, and an application was made on behalf of the plaintiff to revive and renew the first execution.

*Held*, that the first execution being irregular, and not such an execution as, when returned satisfied, would be a bar to any future claim for the amount of the judgment, and so protect the defendant as well as serve the plaintiff, it could not interfere with the issue of an effective execution, or justify the setting aside of the execution last issued, which answered the purposes of both parties.

Costs were refused to the plaintiff, though successful in resisting the main application, as it was through his default in irregularly issuing the first execution that the difficulty arose.

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### BERTRAM v. HERRIMAN.

*Appeal from County Court—Case insufficiently stated—Amendment.*

In a case appealed from the County Court, where the amount in dispute was less than \$40, no case was stated for the opinion of the Court, as required by R. S. c. 105, s. 96. It appeared that an application was made to the Judge below to amend the statement of the case, but that he refused to do so, being of opinion that the case was sufficient as it stood.

*Held*, per SMITH and RITCHIE, JJ., that the case should be sent back in order that a proper case might be made up to be presented for the consideration of the Court.

*Per* McDONALD, C. J., that the case not being stated as required by the statute the appeal was defective and incomplete and should be set aside with costs.

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### ANDERSON v. PARKER.

*Absent or absconding debtor—Summons to agent having goods, etc.—Discharge granted after admission of assets set aside—Costs.*

G. and K. were summoned to appear as agents of the defendant P., an absent or absconding debtor, to disclose what

goods, credits, or effects of P. were in their hands at the time or the service of the writ upon them. G. and K. appeared severally and denied having any goods or credits of P. in their possession or under their control, with the exception of certain goods which had been deposited with them as security for an unpaid balance of account. G. and K. were thereupon discharged under an order at Chambers.

*Held*, on appeal, per JAMES, J., that the words of the Act R. S. c. 104, Order 46, Rule 18, in relation to the discharge of agents only apply to cases where he has filed a declaration that he has not, at the time the summons was served upon him, any goods, effects, or credits of the debtor in his possession or under his control, and that, as G. and K. admitted goods of the debtor in their possession, they were not entitled to such discharge.

*Per* RITCHIE and McDONALD, JJ., that, assuming that the Judge had power to grant the discharge after the possession of assets was admitted, which was doubtful, such discharge should not be granted until after the plaintiff had obtained judgment and could avail himself of the provisions of Rule 13 to realize the value of the goods, less G. and K.'s lien.

Also, that the appeal should be allowed with costs, and that the discharge should not be granted, but that the lien should be reduced to the amount proved, and that G. and K. should be allowed their costs of filing the declaration and of appearing to be examined.

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## READ v. THE MUNICIPALITY OF CAPE BRETON.

*Militia called out in aid of civil power—Requisition must strictly follow the words of the act—Liability of municipality to pay for services.*

The Militia Act, Acts of 1868, c. 40, as amended by the Acts of 1872, c. 46, and the Acts of 1879, c. 35, authorizes the calling out of the militia by the senior officer present in any locality, in aid of the civil power, for the purpose of preventing or suppressing riots, when thereunto required in writing, which writing "shall express on the face thereof the actual occurrence of a riot, disturbance, or emergency, or the anticipation thereof." When so called out the liability to pay for the services of the militia is imposed upon the municipality in which their services are required.

Several companies of militia in the municipality of Cape Breton were called out in pursuance of a requisition which read, "It having been represented to us that a disturbance has occurred, and is still anticipated at Lingan, beyond the power of the civil power to suppress, you are therefore hereby ordered," etc.

*Held*, that in order to make the municipality liable for the maintenance and pay of the militia, the requisition must comply strictly with the statute, and that as it failed to express on its face the actual occurrence of a riot, disturbance, or emergency, or the anticipation of any, but only set out a representation that a disturbance had occurred and was still anticipated, which representation might have been found, on investigation, to be unwarranted by the circumstances, the municipality was not liable.

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## NEW BRUNSWICK.

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In the Supreme Court.

REGINA v. GRIMMER.

*Summary conviction—Justice of the Peace—Disqualification from interest—Bias in favor of prosecutor—Relationship.*

To disqualify a justice from acting in a prosecution before him he should have either a pecuniary, or such other substantial interest in the result, as to make it likely that he would be biassed in favor of one of the parties.

It is not a ground of disqualification that the justice and the counsel who conducted the prosecution are partners in business as attorneys, provided they have no joint interest in the fees earned by the counsel on the prosecution, or, in any fees payable to the justice on the trial of the information. Neither is it any disqualification that the justice was appointed and paid by the town council, at whose instance the complaint was made and the prosecution carried on—his salary being a fixed sum, not dependent on the amount of fines collected.

*Per* ALLEN, C. J., PALMER, FRASER, and TUCK, JJ., (WEBSTER and KING, JJ., dissenting).

## REGINA v. McCAFFERTY.

*Criminal law—Evidence—Confessions of the prisoner—Discovery of goods in consequence of.*

M. was convicted of stealing goods, the property of S. The evidence to connect M. with the crime was his statement to a policeman who had him in charge, that if he went to a particular place he would find the goods. This statement was made in consequence of his being told by the policeman that S. was a good-hearted man, and he (the policeman) thought that if he got his goods back, he would not prosecute. The goods were afterwards found in the place described by the prisoner.

*Held*, (ALLEN, C. J., and KING, J., dissenting) that the prisoner's statement was improperly received, and that the conviction should be quashed.

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## FERGUSON v. TROOP.

*Landlord and tenant—Agreement that landlord might occupy premises for a certain time to make improvements—Eviction—Evidence of.*

Plaintiff demised a building to S. for a term of years—the lease containing a provision that the plaintiff might enter and occupy the building up to a certain day, in order to make repairs and improvements, and that he should not enter after that day without the consent of S. The repairs not having been completed within the time fixed, the plaintiff continued to occupy—claiming the right to do so—and to make repairs without the consent of S., who objected that he was deprived of the possession of the property, and notified the plaintiff that he should claim damages therefor.

*Held*, that this was evidence of an eviction, and was not a mere trespass upon S.

Where there has been an intentional interference by the landlord with the tenant's beneficial enjoyment of the demised premises, so as to prevent him from occupying any part of them for any considerable time, this amounts to an eviction, and operates as a suspension of the rent.

*In re* CORAM.

*Infant—Right of father to custody—Abandonment of right—Habeas corpus.*

A father, being in poor circumstances, left his infant daughter, then aged seven years, with her uncle and aunt upon the understanding that she should be considered as their child, and that they should support and educate her as such. She remained with her uncle and aunt until she was nearly fifteen years of age, and was educated by them, became much attached to them, and was unwilling to leave them—her father contributing nothing toward her support nor interfering with her in any way during that time.

*Held*, per ALLEN, C. J., WETMORE, KING, and TUCK, JJ., (PALMER and FRASER, JJ., dissenting), on an application by the father for a *habeas corpus* to obtain the possession of the child,—1st. That he had the legal right to resume the custody of her, notwithstanding his agreement, even though his object in doing so was that she should assist in the work of his house, and that thereby her duties would be more laborious, and her mode of living less easy and comfortable than she had been accustomed to in her uncle's house—there being no imputation against her father's character, or that she would not be properly cared for in his house.

2nd. That the fact of her having been brought up by her uncle as a Presbyterian, and that her father was a Methodist, was no ground for refusing the father's application.

*Per* PALMER and FRASER, JJ., that in applications of this kind the principal thing to be looked at was the welfare of the child; that it would not be for the interest of the child that the father should exercise his right of custody and force her into a different position in life from that which her education and the habits she had acquired had led her to believe she would occupy; and that, so far as he could do, her father had emancipated her from her duty to submit to his control, and therefore his application ought not to be granted.

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McCATHERINE v. LEWIS.

*County Court—Pleading—General issue.*

*Held*, (PALMER, J., dissenting), that *non assumpsit* was a good plea in an action on a promissory note in a County

Court; that neither the provisions of the Consol. Stat. c. 37, relating to pleading, nor the Act 43 V. c. 8, applied to County Courts; and that whatever was the general issue in suits in those Courts before the Act 36 V. c. 3 could still be pleaded.

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*In re* RUSSELL.

*Canada Temperance Act—Conviction for violation of, and acts in amendment thereof—Liquor License Act, 1883—Amendment of conviction—Surplusage—Refusal to grant certiorari where conviction amendable.*

Before the disallowance of "The Liquor License Act, 1883," by the Judicial Committee of the Privy Council, a conviction was made for selling liquor "contrary to the Canada Temperance Act, 1878, and the acts in amendment thereof."

*Held*,—after the disallowance of the Liquor License Act—that the words "and the acts in amendment thereof," might be treated as surplusage, and the conviction amended accordingly, under ss. 117 and 118 of the Canada Temperance Act; and therefore, that a *certiorari* should not issue to bring up the conviction in order to quash it on account of the addition of those words.

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Supreme Court of Canada.

ONTARIO.]

PLUMB v. STEINHOFF.

*Title to land—Old grant—Starting point to define metes and bounds—How ascertained.*

In an action of ejectment the question to be decided was whether the locus was situate within the plaintiff's lot, No. 5, in concession 18 or within defendant's lot adjoining, No. 24, in concession 17. The grant through which the plaintiff's title was originally derived gave the southern boundary of lot 5 as the starting point, the course being thence 84 chains more or less to the river. The original surveys were lost and the starting point could not be ascertained.

*Held*, affirming the judgment of the Court below, STRONG and TASCHEREAU, JJ., dissenting, that such southern boundary could not be ascertained by measuring back exactly 84 chains from the river.

Moss, Q. C., and Scott, Q. C., for the appellants.

Atkinson, Q. C., for the respondents.



## REGINA v. THE ST. CATHARINES MILLING CO.

*Indian lands—Reserves—Surrender—Title of Crown.*

*Held*, affirming the judgment of the Court of Appeal, 13 A. R. 148, STRONG and GWYNNE, JJ., dissenting, that the lands surrendered by the Indians to the Dominion Government in 1873, by what is known as the N. W. Angle treaty, were not, previous to such surrender, lands reserved for the Indians within the meaning of s. 91, item 24, of the B. N. A. Act, but were public lands under s. 92, item 5, and passed to the Province of Ontario absolutely on such surrender. Only lands specially set apart for the use of the Indians are reserved under s. 91, item 24.

*McCarthy*, Q. C., for the appellants.

*W. Cassels*, Q.C., and *D. Mills*, for the respondents.

## THE GRAND TRUNK R. W. Co. v. BECKETT.

*Railway Company—Negligence—Death caused by running through town—Contributory negligence—Insurance on life of deceased—Reduction of damages.*

In an action against the G. T. R. W. Co. for causing the death of the plaintiff's husband by negligence of their servants, it was proved that the accident occurred while the train was passing through the town of Strathroy; that it was going at the rate of over thirty miles an hour, and that no bell was rung or whistle sounded, until a few seconds before the accident.

*Held*, affirming the judgment of the Court of Appeal, 13 A. R. 174, that the company were liable in damages.

For the defence it was shown that the deceased was driving slowly across the track with his head down and that he did not attempt to look out for the train until shouted to by some persons who saw it approaching, when he whipped up his horses and endeavored to drive across the track and was killed. As against this there was evidence that there was a curve in the road which would prevent the train being seen and also that the buildings at the station would interrupt the view. The jury found that there was no contributory negligence.

*Held, per* RITCHIE, C. J., and FOURNIER and TASCHEREAU, JJ., that the finding of the jury should not be disturbed. STRONG and GWYNNE, JJ., contra.

The life of the deceased was insured and on the trial the learned Judge deducted the amount of the insurance from the damages assessed. The Divisional Court overruled this and directed the verdict to stand for the full amount found by the jury. This was affirmed by the Court of Appeal.

*Held*, that the judgment in this respect should be affirmed.

*Osler*, Q. C., for the appellants.

*S. H. Blake*, Q.C., and *Folinsbee*, for the respondent.

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### MCLEAN v. WILKINS.

*Mortgagor and mortgagee—Assignment of mortgage—Purchase of equity of redemption by sub-mortgagee—Sale of same—Liability to account.*

M., executor of a mortgagee, assigned the mortgage to C., who brought suit for foreclosure but settled such suit by assigning the mortgage to H., one of the defendants. Prior to this the mortgage had been deposited with H. as collateral security for a loan to M. H. then purchased the equity of redemption, which he sold for a sum considerably in excess of the claim of C. and his own claim. In a suit by H. to foreclose M.'s interest,

*Held*, reversing the judgment of the Court of Appeal, 13 A. R. 467, and restoring that of the Common Pleas Division, 10 O. R. 58, that H. as sub-mortgagee was bound to account to M. for the proceeds of the sale of the equity of redemption.

*S. H. Blake*, Q.C., and *W. Cassels*, Q.C., for the appellants.

*Moss*, Q.C., for the respondents.

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QUEBEC.]

### BRADY v. STEWART.

*Litigious rights—Sale of—Art. 1583, C.C.*

B. became holder of 40 shares upon transfers from D. *et al.* in the capital stock of the St. Gabriel Mutual Building Society. At the time of the transfers the shares in question had been declared forfeited for non-payment of dues. Subsequently by a judgment of a Court rendered in a suit of one C., whose shares had also been confiscated for similar reasons, such shares were declared to be valid and to have been illegally forfeited. Thereupon B., by petition for a writ of

mandamus, asked that he be recognized as a member of the society and be paid the amount of dividends already declared in favor of and paid to other shareholders. B.'s action was met, amongst other pleas, by one setting forth that B. had acquired under the transfers in question certain litigious rights, and that by law he was only entitled to recover from the respondents the amount he had actually paid for the same, together with legal interest thereon and his costs of transfers.

*Held*, FOURNIER and HENRY, JJ., dissenting, that at the time of the purchase of said shares B. was a buyer of litigious rights, and under Art. 1583, C.C., could only recover the price paid with interest thereon.

*O'Doherty*, for the appellant.

*Curran*, Q.C., for the respondent.

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### LEGER v. FOURNIER.

*Sale a remere—Term—Notice—Mise en demeure—Chose jugée—Improvements.*

*Held*, affirming the judgment of the Court below, where the right of redemption stipulated by the seller entitled him to take back the property sold within three months from the day the purchaser should have finished and completed houses in course of construction on the property sold, it was the duty of the purchaser to notify the vendor of the completion of the houses, and in default of such notice, the right of redemption might be exercised after the expiration of the three months.

2. The exception of *chose jugée* cannot be pleaded where the conclusions of the second action are materially different from those of the first, and so, although the present respondent attempted to exercise his right of redemption in a prior action for a less sum than stipulated, it was held that the dismissal of the first action was not *chose jugée* as regards the present action offering to pay the amount and conditions stipulated.

TASCHEREAU and GWYNNE, JJ., were of opinion in this case that the appellant was entitled to \$302 for improvements over and above the stipulated price, instead of \$40 allowed by the Court below.

*Lee Lorimer*, for the appellant.

*Laflamme*, Q. C., for the respondent.

## PION v. NORTH SHORE R. W. CO.

*Navigable river—Access to by riparian owner—Right of—Railway company responsible for obstruction—Damages—Remedy by action at law, when—43 & 44 V. c. 43, s. 7, s-ss. 3, 5 (P. Q.)*

*Held*, reversing the judgment of the Court below, TASCHEREAU, J., dissenting, that a riparian owner is entitled to damages against a railway company, although no land is taken from him, for the obstruction and uninterrupted access between his property and the navigable waters of a river and the injury and dimution in value thereby occasioned to the property.

2. That the railway company in the present case not having complied with the provisions of 43 & 44 V. c. 43, s. 7, s-ss. 3, 5, (P. Q.), the appellants' remedy by action at law was admissible.

*Langelier*, Q.C., for the appellants.

*Irvine*, Q.C., and *Duhamel*, Q.C., for the respondents.

## ROBINSON v. THE CANADIAN PACIFIC R. W. CO.

*Damages—Misdirection as to solatium—New trial—Art. 1056, C. C.*

In an action for damages against a railway company, brought by the widow of a servant of the company killed in the discharge of his work, the Judge at the trial directed the jury that in assessing the amount of damages if they found for plaintiff, they might consider the nature of the anguish and mental sufferings of the widow and child of the deceased.

*Held*, reversing the judgment of the Court below, that there was misdirection.

The effect of Art. 1056, C. C., considered.

*R. W. Scott*, Q.C., and *H. Abbott*, for the appellants.

*Hatton*, for the respondents.

## CENTRAL VERMONT R. W. CO. v. TOWN OF ST. JOHNS.

*Railway bridge and railway track—Assessment of illegal—40 V. c. 29, ss. 326, 327 — Injunction proper remedy — Extension of town limits to middle of a navigable river—Intra vires of local legislature—43 & 44 V. c. 62 (P. Q.)*

*Held*, reversing the judgment of the Court of Queen's Bench, Montreal, FOURNIER and TASCHEREAU, JJ., dissenting, that the portion of the railway bridge built over the Richelieu River, and the railway track belonging to appellants' company within the limits of the town of St. Johns are exempt from taxation under ss. 326 and 327 of 40 V. c. 29 (P. Q.)

2. That a warrant to levy rates upon such property for the years 1880-83 is illegal and void, and that a writ of injunction is a proper remedy to enjoin the corporation to desist from all proceedings to enforce the same.

As to whether the clause in the Act of incorporation of the town of St. Johns, P. Q., extending the limits of said town to the middle of the Richelieu River, a navigable river, is *intra vires* of the legislature of the Province of Quebec, the Supreme Court of Canada affirmed the holding of the Court below that it was *intra vires*.

*Church*, Q.C., for the appellants.

*Robidoux*, for the respondents.

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## THE MAGOG TEXTILE AND PRINTING CO. v. DOBELL.

*Joint stock company—31 V. c. 25 (P. Q.)—Action for calls—Subscriber before incorporation—Allotment—Non-liability.*

D. signed a subscription list undertaking to take shares in the capital stock of a company to be incorporated by letters patent under 31 V. c. 25 (P. Q.), but his name did not appear in the notice applying for letters patent nor as one of the original corporators in the letters patent incorporating the company. The directors never allotted shares to D., as required by 31 V. c. 25, s. 25, and he never subsequently acknowledged any liability to the company.

In an action brought by the company against D. for calls due on the company's stock,

*Held*, affirming the judgment of the Court below, that D. could not be held liable for calls on stock.

*Bosse*, Q.C., and *Beique*, for the appellants.

*Irvine*, Q.C., and *Stuart*, for the respondents.

NOVA SCOTIA.]

MOTT v. THE BANK OF NOVA SCOTIA.

*Insolvent Bank—Winding-up proceedings—45 V. c. 23—47 V. c. 137—Bank already insolvent placed in liquidation—Proceedings under what statute.*

The Bank of Liverpool was placed in insolvency in 1879 under the Insolvent Act of 1875, and the Bank of Nova Scotia appointed assignee. In 1884 the assignee applied to have the insolvent bank placed in liquidation under 45 V. c. 23 and 47 V. c. 137. The Chief Justice of Nova Scotia granted the petition and appointed the Bank of Nova Scotia liquidator, holding that ss. 2 and 3 of the act of 1882 applied to banks. The Supreme Court of Nova Scotia affirmed this order. On appeal to the Supreme Court of Canada,

*Held*, STRONG and GWYNNE, JJ., dissenting, that these sections do not apply to banks, but an insolvent bank must be wound up with the same formalities as in the case of a bank not insolvent, according to ss. 99 to 102, inclusive, of the Act of 1884, and three liquidators must be appointed in the manner therein provided.

*Henry*, Q.C., for the appellants.

*Sedgewick*, Q.C., and *Borden*, for the respondents.

BRITISH COLUMBIA]

SEA v. McLEAN.

*Sale of land—Sale by executors—Powers under will—Advertisement—Description—Words "more or less."—Breach of trust.*

By the terms of the testator's will executors were empowered to sell so much of the real estate as might be necessary to pay off a mortgage thereon and any other debts that the personal estate was insufficient to discharge. The executors offered for sale land described in the advertisement as "some 60 acres (more or less) s. 78 hoch end Tansi Victoria District." The advertisement stated that the property to be sold adjoined M. Rowland's land, and had a frontage on the inside road and on the road known as "Carey's road."

At the sale a plan was annexed to the advertisement showing a lot colored pink bounded by the above named roads. The auctioneer stated that the quantity was not known, but would have to be determined by a survey to be made at the joint expense of vendor and purchaser. The land was offered for sale by the acre and was knocked down to one S. at \$36 per acre.

After the sale a survey was made and the land was found to contain 117 acres. S. claimed the whole quantity and tendered the price and a deed for signature to the executors. They claimed, however, that they only intended to sell 60 acres measured on the side adjoining Rowland's land and to sell more would be a breach of trust on their part, as they only wanted some \$2,000.00 to pay the mortgage and debts of the estate. S. brought a suit for specific performance.

*Held*, reversing the judgment of the Supreme Court of British Columbia, GWYNNE, J., dissenting, that S. was entitled to the 117 acres.

*Robinson, Q. C., and Eberts, for the appellant.*

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## ONTARIO.

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### Supreme Court of Judicature.

#### COURT OF APPEAL.

Q. B. D.]

[29TH JUNE, 1887.

BAKER v. ATKINSON.

*Lease determined by forfeiture—Right of distress—One year's rent payable on insolvency—8 Anne c. 14, s. 6—Payment of rent to save goods.*

By the terms of a lease it was stipulated that "if the said lessees shall make any assignment for the benefit of creditors, or becoming bankrupt or insolvent shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, the said lease shall immediately become forfeited and void, and the full amount of the next ensuing one year's rent shall be at once due and payable."

*Held*, (1) affirming the judgment of the Court below, 11 O. R. 735, notwithstanding the provisions of 8 Anne c. 14, s. 6, that a distress for the year's rent falling due next after an assignment by the lessees for the benefit of creditors was

illegal and void, the statute applying only to cases where the tenancy has been determined by lapse of time, not by forfeiture; but

*Held*, (2) in this reversing the same judgment, that money paid to the lessors by the solicitor of certain execution creditors in full of such rent, with knowledge of all the facts, so as to prevent a sacrifice of the goods, could not be recovered back either by the execution creditors or the assignee; the amount having been repaid to the solicitor out of the proceeds of such goods when sold by the sheriff, as was expected by the solicitor would be done when making such payment.

*Robinson, Q.C., and Atkinson, Q.C., for the appellants.*

*Moss, Q.C., and Rankin, for the respondent.*

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CH. D.]

RATTE v. BOOTH.

*Riparian proprietor—Navigable stream—Reservation in Crown grant—  
Statute of Limitations.*

A certain water lot on the river Ottawa was granted by the Crown to A. The description in the patent covered the lot and two chains distant from the shore, but there was a reservation "of all mines of gold and silver, the free uses, passage, and enjoyment of, in, over, and upon all navigable waters that shall or may be hereafter found in or under, or be flowing through, or upon any part of the said parcel of land hereby granted."

A. granted to P. the lot with certain exceptions, but including the part covered by water; and P. in 1867 granted to the plaintiff part of the lot down to and bounded by the water's edge. The plaintiff had been on the place on contract for purchase for a year before the conveyance, and had built a dwelling-house and a boat-house and floating wharf, the latter extending at this time sixteen feet outwards from the bank into the stream, and being afterwards enlarged so as to extend forty feet into the stream. By means of this wharf the plaintiff carried on business as a letter of pleasure boats, and brought this action complaining of injuries to his business, and to him as a riparian proprietor, by the deposit of refuse from the defendants' mills in the water in front of



his land, hindering access from his wharf to the actually navigable part of the river, and fouling the waters of the stream upon or in contact with his land.

It was contended that the plaintiff had no title as a riparian proprietor, as P. owned the portion of the water lot outside of the plaintiff and could bar him from access to the river, and also that the reservation in the patent was repugnant to the rest of the grant, which should be read as giving the whole lot there specified.

*Held*, [affirming the judgment of the Chancery Division, 11 O. R. 491] BURTON, J. A., dissenting, that the plaintiff was entitled to recover damages for the injuries complained of.

*Per* HAGARTY, C.J.O., and OSLER, J.A. For the purposes of this suit the plaintiff is to be regarded as a riparian proprietor. How can wrong-doers in no privity with P. raise the question of his right to block the plaintiff from the water? The Crown, owning the bed of this navigable river, could grant a portion thereof, reserving the public right of user, which is the meaning of the reservation in the patent.

*Per* PATTERSON, J. A. The terms of the reservation in the patent do not point to the public right of navigating the waters. The patent cannot be construed as reserving the use of the waters in any sense or for any purpose different from the reservation of the mines; and the mines cannot be treated as reserved for the public benefit except in a sense foreign to the present discussion. The public right to the use of navigable waters is the right of each individual, and stands on a different footing; it does not come by grant from the Crown, but is a paramount right to be curtailed only by Act of the legislature. A public easement cannot be the subject of an exception in favour of the grantor. If the exception were construed as perpetuating the *jus publicum*, it would be repugnant to the grant in its operation under the statute 23 V. c. 2, s. 35, and would be void. The true reading of the patent is that the reservation touching navigable waters is applicable only to the other parts of the lot, and not to the two chains of the river bed. The whole lot vested in A. free from the asserted *jus publicum*; and

the plaintiff as against his grantor, P., and *a fortiori* as against wrong-doers, has acquired a title to the river portion under the statute of limitations.

*Per* BURTON, J. A. The plaintiff cannot be regarded as a riparian proprietor; the person filling that position is P., and on his filling in the lot, as he is entitled to do, to the limit of his grant, the plaintiff will be entirely cut off from the stream. The plaintiff, a trespasser, cannot complain of others trespassing on portions of the property of which he is not in possession, although it may interfere with his access to the portion of which he is in possession. If the words of the reservation in the patent extend to the right of navigation, the reservation is absolutely void. The statute 23 V. c. 2, s. 35, gives to the Crown the right to grant the bed of the river and the water upon it free from any rights *publici juris*. The statute of limitations could give the plaintiff no title to any part of the water-covered land except that actually occupied by his floating wharf and boat-house.

*McCarthy*, Q.C., and *Gormully*, for the appellants.

*J. MacLennan*, Q.C., for the respondent.

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FERGUSON, J.]

### HUGGINS v. LAW.

*Executors—Guardian—Infants—Payment of infants' moneys to guardian.*

Moneys belonging to infant legatees being in the hands of the defendants, who were the executors of the testatrix, one F., a solicitor, obtained from the Surrogate Court his appointment as guardian of the infants, and demanded of and received from the executors the moneys, which F. subsequently misapplied and then absconded.

*Held*, reversing the judgment of FERGUSON, J., 11 O. R. 565, HAGARTY, C. J. O., dissenting, that the defendants were not liable.

*McCarthy*, Q.C., and *Bain*, Q.C., for the appellants.

*Moss*, Q.C., and *Guthrie*, Q.C., for the respondents.

## High Court of Justice.

## CHANCERY DIVISION.

[THE DIVISIONAL COURT, 5TH SEPTEMBER, 1887.]

## AMBROSE v. FRASER.

*Husband and wife—Covenant running with the land—Assignment of the reversion by the lessor to his wife—Set-off.*

The judgment of Ferguson, J., affirmed with costs.

*Per* BOYD, C. Privity of estate is not tantamount to privity of contract in order without more to affect the separate estate of a married woman as if she had expressly contracted with reference thereto. There is no right therefore to fix liability for the amount claimed upon the separate estate of the defendant Amelia Fraser.

*Moss*, Q.C., for the plaintiff.

*Osler*, Q.C., for the defendants.

[10TH SEPTEMBER, 1887.]

## SADERQUIST v. THE ONTARIO BANK.

*Deposit receipt—Fraudulent receipt of the money—Lapse of time without depositor notifying deposittee—Onus of notice—Estoppel.*

The plaintiff, an ignorant man, deposited \$650 with the defendants on the 24th September, 1884, and handed the deposit receipt which he got to S. S. for safe keeping and went away to work on a railway. He returned in April, 1885, when S. S. told him he had drawn the money on the receipt and promised to pay him back.

The plaintiff, not knowing that he had any rights against the Bank, did nothing further, and S. S. left the country in the August following, being heavily in debt. In the December following the plaintiff was advised that he had rights against the bank, and he consulted a solicitor, who promised to attend to it, but did nothing.

In April, 1886, he consulted another solicitor, when a demand was made on the bank and refused, and action brought. The demand was the first intimation the plaintiff gave the bank of what had been done. In an action against the bank for the amount :

*Held*, reversing the judgment of ARMOUR, J., that the delay was not suggestive of collusion or any unfair dealing on the part of the plaintiff. No legal duty was cast upon the plaintiff to advise the bank that it had been deceived in or after April, 1885. His failure to claim his money or sue the bank at that time did not operate against him so long as his claim was not barred by the Statute of Limitations.

There was no negligence on his part which caused or contributed to the fraud so as to raise an estoppel. As there was no duty cast upon the plaintiff to notify the bank, one of the essential elements of estoppel by conduct was absent.

*The Merchants Bank v. Lucas*, 13 O. R. 520, distinguished.

*Ritchie*, Q.C., for the plaintiff.

*Falconbridge*, Q.C., for the defendants.

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[BOYD, C., 27TH MAY, 1887.]

## PRATT v. THE CORPORATION OF THE CITY OF STRATFORD.

*Municipal corporation—Jurisdiction over streets—Absence of by-law for the work—Damage to adjacent owners—Remedy by action or arbitration—46 V. c. 18 (O.)*

The plaintiff, who was the owner of certain premises which were injuriously affected by the raising of a street by the defendants in building a bridge and its approaches, brought an action for damages.

*Held*, that he could not avail himself of the absence of a by-law for the construction of the bridge in order to proceed by way of an action for damages ; that his remedy was under the arbitration clauses of the Consolidated Municipal Act, 1883, 46 V. c. 18, for compensation ; and his action was dismissed with costs.

An owner of land has by common law no vested right to the continuance of the highway at the level it was when he purchased.

The corporation as owners or trustees for the public have the right to repair and improve streets and bridges without a by-law for that purpose.

*W. Cassels, Q.C., and Pennyfather, for the plaintiff.*

*Idington, Q.C., for the defendants.*

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[29TH SEPTEMBER, 1887.]

*In re* CLARK AND THE UNION INSURANCE CO.

*Dominion Winding-up Act—Application to provincial corporations—Constitutionality—R. S. C. c. 129.*

*Held*, that the Winding-up Act, R. S. C. c. 129, is within the competence of the Dominion Parliament under section 91, article 21, of the British North America Act, and that the present Company though incorporated under a provincial charter is subject to its provisions.

*Gillespie v. The Merchants' Bank*, 10 S. C. R. 312, distinguished.

*Bain, Q.C., for the petitioners.*

*W. Cassels, Q.C., for Shoolbred, a creditor.*

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[PROUDFOOT, J., 5TH SEPTEMBER, 1887.]

WELLS v. NORTHERN RAILWAY COMPANY.

*Railway—User—Subway—Consolidated Railway Act, 1879, s. 27.*

The plaintiff was the owner of certain lands, a right of way over which had in 1854 been sold by J. G., the then owner, to the defendants. The defendants built their railway along this right of way in 1858, and where the road crosses a depression in the ground a trestle bridge was built and a subway left under. From 1862 up to a few months before this action was brought the plaintiff and those under whom he claimed enjoyed the undisputed use of this subway.

The defendants were now filling it in order to make a solid track across the depression, and refused to give any compensation for it to the plaintiff, and the plaintiff asked for damages for the obstruction of the subway and to have it reopened. The defendants pleaded not guilty and referred to the Consolidated Railway Act, 1879, s. 27.

*Held*, that the evidence in this case showed such an enjoyment as of right of the subway and such an open and continuous user thereof that the plaintiff was entitled to assume that there was a reservation of it in the deed of conveyance from J. G. to the defendants or was entitled to claim the easement under the Prescription Act. He could not prevent the filling up of the trestle work, but was entitled to damages for his property in the easement, which damages should, if the parties could not agree, be ascertained under the Railway Act.

*Ritchie, Q.C., and R. Boulton, for the plaintiff.*

*S. H. Blake, Q.C., for the defendants.*

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[FERGUSON, J., 30TH SEPTEMBER, 1887.]

*In re* HAGUE, TRADERS' BANK v. MURRAY.

*Husband and wife—Dower—Equity of redemption—Building mortgage.*

In the course of the administration in the Master's Office of the lands and personal estate of William Hague, it appeared that prior to his decease he was seised in fee simple absolute of a certain vacant lot in the city of Toronto, and that in the year 1883, desiring to build upon the lands, he gave a mortgage of the land to a loan company and executed at the same time a contemporaneous agreement setting out that the mortgage moneys were to be advanced as the building progressed upon progress certificates of the architect of the house.

Evidence was given to show that the money was actually advanced and went into the building. Afterwards, on March 10th, 1886, after the completion of the building, William Hague died. In the Master's Office his widow claimed that she was entitled to dower in the full value of the land, though the above mortgage still subsisted upon it and had to

be paid off out of the purchase moneys. It was objected on behalf of the creditors that she was only entitled to dower out of the equity of redemption and in the value of the equity of redemption after paying off the mortgage.

*Held*, reversing the decision of the Master in Ordinary, that the widow was entitled to dower out of the equity of redemption in the full value of the lands.

*Moss*, Q.C., and *Lefroy*, for the creditors.

*J. Reeve*, for the widow.

*Reesor*, for the executor and trustee.

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## IN CHAMBERS.

[BOYD, C., 13TH SEPTEMBER, 1887.]

*In re* HALL.

*Advancement—Intestacy—Hotchpot—R. S. O. c. 105, ss. 41-43.*

J. H. died intestate, and among his assets was found a promissory note for \$500, made by his son in his favour. This son of J. H. had predeceased him and died intestate, leaving a child who claimed to share under the statute of distributions in the estate of J. H. with the children of J. H. The question was whether he was bound to bring the \$500 into hotchpot so as to equalize the shares coming to him and the children of J. H.

*Held*, that the writing required by R. S. O. c. 105, ss. 41-43, to evidence an advancement under those two sections may be either an expression by the intestate that the donation is by way of advancement or an acknowledgment to the same effect by the child; but in this case the only writing was the note, and that imported that the original dealing was one of loan or debt between the parties, and as such did not satisfy the statute, and the grandchild of J. H. was not required to bring the amount of that note into hotchpot.

The difference between the law of England and that of Ontario as to advancement commented upon.

*J. R. Roaf*, for the administrator of J. H.

*J. Hoskin*, Q.C., for the infants.

[ARMOUR, J., 2ND SEPTEMBER, 1887.]

## NORSWORTHY v. SCOTT.

*Attachment of debts—Mortgagors as garnishees—Mortgagee trustee for judgment debtor.*

The plaintiffs recovered judgment against T. B. S. and issued execution. They afterwards obtained an order from the local Judge at St. Thomas, attaching moneys payable by the garnishees under a mortgage made by them in favour of one N. E. S., who, it was alleged, was a mere trustee for T. B. S. The garnishees appeared and upon the facts shewn by them N. E. S. was made a party as a claimant. After investigation before the local Judge it appeared that N. E. S. was entitled in his own right to a portion of the moneys secured by the mortgage, but as to the balance was to hold them as trustee for T. B. S. The local Judge thereupon directed the garnishees to pay N. E. S. to the extent to which he was entitled in his own right and to pay to the execution creditors the balance. The mortgage executed by the garnishees in favour of N. E. S. was in the usual form with the statutory covenant for payment.

The garnishees appealed from the above order on the ground that they should not be ordered to pay any sum to the execution creditors of T. B. S., for whom N. E. S. was now found to be trustee of part of the moneys secured by the mortgage, but that N. E. S. to whom they had covenanted to pay the money should be ordered to pay over the balance after satisfying his own debt.

*C. J. Holman*, for the appellants.

*W. M. Douglas*, for the respondents.

ARMOUR, J., after reserving judgment affirmed the order, supplementing it, however, by declaring that the payment by the garnishees to the execution creditors should be deemed payment under the mortgage and by ordering that N. E. S. should execute a proper discharge of the mortgage upon the garnishees making payments in pursuance of the order. The garnishees were allowed their costs of the appeal to be deducted from the mortgage moneys.

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[FERGUSON, J., 13TH SEPTEMBER, 1887.]

*In re* SOLICITOR.*Solicitor—Delivery of bill to third party—Right to taxation—Præcipe order.*

Upon the application of a mortgagor the mortgagees' solicitor was ordered by a County Judge to deliver to the applicant a copy of the bill of costs of a sale under the power in the mortgage (see *ante* p. 297); and the bill was delivered pursuant to the order.

*Held*, that although the delivery was, under s. 45 of the Attorneys' Act, to be regarded as for the purposes of a reference to taxation, yet the person so obtaining the copy of the bill had not necessarily the right to tax the bill; and a *præcipe* order for taxation was set aside, where at the time of making it there were two matters in dispute, viz., whether payment as such had been made by the mortgagees to the solicitor, and whether the mortgagees had precluded themselves from the right to tax the bill.

*Hoyles*, for the solicitor.

*E. Douglas Armour*, for the mortgagor.

[ROSE, J., 9TH SEPTEMBER, 1887.]

## SMITH v. CLARKE.

*Discovery—Action on building contract—Examination of architect.*

In an action against the trustees of an Orange Lodge for the price of work and materials furnished in building a hall, in which the principal defendant was examined and could give no information as to the matters in dispute, and it appeared from his examination that the architect employed by the defendants was the only one who could give the information sought, an order was made for the examination of the architect for the purpose of discovery only.

*O'Sullivan*, for the plaintiff.

*Gwynne*, for the defendants.

## ROSS v. THE CANADIAN PACIFIC R. W. CO.

*Change of venue—Preponderance of convenience.*

An action for trespass to land by cutting timber, etc., was commenced in Toronto, where the solicitors for the plaintiff, the defendants, and the third parties resided. The plaintiff lived in Quebec, and his agent in Toronto. The third parties, who were really in the position of defendants, lived in Pembroke. The defendants swore that they would require at the trial four witnesses from Pembroke or vicinity, one from North Bay, two from Dakota, U. S. A., and one from Ottawa. The plaintiff swore to eight witnesses, all in Toronto or west of Toronto. The *locus in quo* was neither in the county of York nor Renfrew.

*Held*, that there was not sufficient preponderance of convenience in favour of Pembroke to warrant changing the venue to that place.

*Shroder v. Meyers*, 34 W. R. 261, followed.

*W. H. P. Clement*, for the plaintiff.

*MacMurchy*, for the defendants.

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NICHOLSON v. LINTON.

*Change of venue—Preponderance of convenience.*

An action to recover the price of a quantity of steel; the principal defence being inferiority in quality. The plaintiffs lived in England, and their Montreal agent sold the steel to the defendant at Galt, where the latter lived, delivered the steel there, attended there for the purpose of endeavouring to settle the dispute, and was present at a test made in Galt. The plaintiffs laid the venue at Cornwall, and the defendant moved to change it to Berlin, fourteen miles from Galt. All the defendant's witnesses, six in number, including the defendant himself, lived in Galt. The plaintiffs named no witnesses except the Montreal agent, but after notice had been given of the motion to change the venue the agent directed one bar of the steel to be re-shipped from Galt to Montreal to have a test made, and then said generally that he would require to call experts from Montreal to prove the result of

the test, but did not say how many. The defendant swore that the expense to him of taking witnesses to Cornwall would be about \$135, and to Berlin about \$14.

*Held*, that the very great preponderance of convenience was in favour of Berlin, and the venue was therefore changed.

*Shroder v. Meyers*, 34 W. R. 261, distinguished.

*Osler*, Q.C., for the plaintiffs.

*C. J. Holman*, for the defendant.

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### KELLY v. WOLFF.

*Landlord and tenant—Ejectment—Title of landlord, expiry of—Bona fide defence—Ejectment Act, ss. 65, 66.*

In an action of ejectment by a landlord against a tenant whose term had expired,

*Held*, that the defendant was not precluded from setting up that the plaintiff's title expired or was put an end to during the term; and to raise such defence it was not necessary for the tenant to go out of and then resume possession.

Ss. 65 and 66 of the Ejectment Act do not apply where a *bona fide* defence or dispute is raised; and in this case a motion by the plaintiff for security for damages and costs, under these sections, was refused.

*Quære*, whether ss. 65 and 66 would apply to any case where the tenant actually gives up possession, so that the landlord is in possession, and then retakes.

*Allan Cassels*, for the plaintiff.

*Aylesworth*, for the defendant.

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### McKAY v. PALMER.

*Prohibition—Division Court—Matter of practice.*

A motion for prohibition to a Division Court on the ground that the action was revived by the administrator of the plaintiff without serving a summons or notice on the defendant, as required by the Division Court rules, was refused, the irregularity complained of being a mere matter of practice and therefore not reviewable in prohibition.

*Caswell*, for the motion.

*C. J. Holman*, contra.

[THE MASTER IN CHAMBERS, 8TH SEPTEMBER, 1887.]

BLAKE v. TORONTO BREWING AND MALTING CO.

*Irregularity, motion for—Defective material—Notice of trial—Close of pleadings.*

Motion by the defendants to set aside the notice of trial served by the plaintiff on the 2nd September for the Toronto assizes, beginning on the 12th September.

The plaintiff had served a special reply, not merely a joinder of issue, on the 29th of June, and the defendants moved against the notice of trial on the ground that it was irregular, because the pleadings were not closed when it was served.

*Kappele*, for the motion, referred to Rules 175, 176, and 180, and to MacLennan's Judicature Act, 2nd ed., pp. 321, 322.

*W. J. Nelson*, for the plaintiff, objected that the affidavit filed by the defendants did not shew that no joinder of issue had been served when the notice of trial was given, referring to *Weller v. Proctor*, 10 P. R. 323.

THE MASTER IN CHAMBERS.—It is to be presumed that the notice of trial is regular unless the contrary is shewn, and I shall assume that there was a joinder of issue, as the defendants have not negatived it. The motion is of a technical kind and must therefore be looked at with strictness. I must dismiss the motion.

*Kappele*. The defendants can make another motion supplying the defect in the material. There is no doubt about the fact that there was no joinder. What is to be gained by forcing the defendants to another motion?

THE MASTER.—Another motion will not lie after this is defeated.

*Motion dismissed, with costs to the plaintiff in any event.*

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## NOVA SCOTIA.

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In the Supreme Court.

PATCH v. PITMAN.

*Insurance—Marine—Freight—Constructive total loss—Notice of abandonment—Recovery against underwriters.*

The plaintiff shipped a cargo of deals by the brigantine *John D. Tupper*, from Newcastle, N.B., to Connah Quay, Wales. In getting out of the Bay of Fundy the vessel stranded, and the surveyors who were called to examine her reported that they found her entirely unseaworthy, and recommended that she should be sold for the benefit of all concerned. A further survey was held, and the surveyors further reported that there were no facilities for repairing the vessel where she lay; that she would require to be almost entirely rebuilt, and that the cost would exceed her value when repaired.

The vessel having been sold where she lay, her cargo, with the exception of a small portion which could not be profitably carried by the owner, was reshipped to the port of destination at a cost exceeding the amount of the chartered freight.

The vessel was taken to St. John, N.B., by the purchaser and repaired, and sailed for Havana with a cargo.

*Held*, that, in the absence of evidence to show that the vessel was restored to a seaworthy condition, and that the cost had not exceeded her value when restored, this was not sufficient to bring the case within the application of the principle by which the right of abandonment, once accrued, becomes divested.

*Held*, further, that the insurers were the proper parties to decide whether to carry the cargo forward or not, so as to earn any difference that could be made between the charter value of the freight and what it could have been carried for, and that the plaintiff, having been in possession of the cargo at the time of the loss and in a position to carry it forward, was bound to give notice of abandonment in order to recover against the underwriters.

## RONNE v. THE MONTREAL OCEAN S. S. CO.

*Common carrier—Contract made with agent—Agent's employees—Power to do certain acts—Liability of principal in case of loss—Exemptions—Ordinary course of business.*

A number of cases of wine were delivered to S. & Co., the defendants' agents at the port of Antwerp, to be forwarded to the plaintiff at Halifax, N. S. The bill of lading was signed by S. & Co., p.p. G.K., and described the goods as "shipped in good order and condition." The goods were shipped from Antwerp by a steamship running to Liverpool, G. B., and on their arrival at that port were reshipped on board one of defendants' steamships for Halifax. On their arrival the plaintiff was notified of the fact by C. & Co., the defendants' agents at Halifax, and was required to pay the freight and take delivery. C. & Co. also demanded and received from the plaintiff his share of a general average loss incurred in consequence of an accident to the ship on the voyage. On examining the goods previous to delivery it was found that several of the cases had been tampered with and a number of bottles of wine emptied of their contents.

G. K., by whom the signature of S. & Co. was affixed to the bill of lading at Antwerp, had no written authority to do so, but was the chief clerk and proxy of the firm, and acted in the usual course of business.

*Held, per JAMES, J.*, that the bill of lading having been produced by the plaintiff at the request of the defendants' agents at Halifax, and having been recognized by them, and they having demanded and received from the plaintiff his proportion of the general average loss, the paper, whether properly signed or not, must be treated as the contract under which the defendants received and carried the goods; that the defendants were bound by the admission in the bill of lading that the goods were received in good order and condition, and, the goods having been tampered with while in their possession, in the absence of evidence to bring them within the exemptions in the bill, the defendants were liable.

*Per McDONALD, J.*, that the appointment of S. & Co. as the defendants' agents authorized them to perform all things usual in the line of business in which they were employed, and involved power to do particular acts by others within

the scope of their business. That C. K., as their chief clerk, was competent to sign the name of the firm to bills of lading in the ordinary course of business without any written authority to do so. That the signature to the bill of lading having been proved to have been made in the usual course of business must be taken to have been authorized by the defendants, especially as the evidence shewed that it was afterwards adopted and acted upon both by S. & Co., and by the defendants' agents in Halifax. That defendants were bound to bring themselves within the exemptions contained in the bill of lading, and, having failed to do so, were liable.

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### REGINA v. McDONALD.

*Canada Temperance Act—Conviction—Certiorari—Court may look at evidence to determine jurisdiction—Practice.*

The defendant was convicted before the stipendiary magistrate for the police district of Yarmouth of having unlawfully sold intoxicating liquor contrary to the provisions of the Canada Temperance Act, 1878. A writ of *certiorari* having issued, the magistrate sent up the minutes of the evidence taken before him as part of his return, instead of returning the facts.

*Held*, following *Hawes v. Hart*, 18 N. S. Reps. 42, that the evidence being before the Court, it might be looked at to determine the question of jurisdiction.

It appeared from the minutes of evidence that the defendant, who was keeper of an hotel or boarding house, had gone out and purchased or procured liquor for her boarders with money given her for that purpose, acting merely as a messenger, and without making any profit.

*Held*, that this evidence was not sufficient to support the conviction.

*Quære*, whether points which had been discussed on the application for the writ of *certiorari* could be brought before the Court a second time on the motion to quash the conviction.

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## ROACH v. WARE.

*Conventional line—Assent given under mistake as to facts—Practice.*

M. R. being about to make a conveyance of land to V. R. went on the land in company with V. R., and fixed the starting point from which the line was to run. A deed was made accordingly. After the death of M. R., the plaintiff, his widow, with the consent of V. R., got a surveyor to run the line, which was done from the starting point indicated by M. R., but, in consequence of an error of the surveyor, on a course five degrees different from that mentioned in the deed. V. R. was not present when the survey was made, but subsequently assented to the line as run, in ignorance of the fact that a mistake had been made. V. R. conveyed to the defendant, according to the description in his deed.

*Held*, that the assent given by V. R. to the line as run by the surveyor was not sufficient to establish a conventional line.

All the facts being before the Court, and it appearing that the plaintiff could not succeed if the case were sent to a new trial, judgment was ordered to be entered for the defendant with costs.

*Millar v. Toulmin*, 17 Q. B. D. 603, followed.

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NEW BRUNSWICK.

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In the Supreme Court.

HARRIS v. GREENE.

*Equitable set-off—Judgment—Cross-claims and damages arising out of the same contract—Assignment of claim after verdict—Pleading set-off.*

G. brought an action against H. for breach of an agreement to construct railway cars, and for money had and received. On the same day H. brought an action against G. on the same agreement for refusing to accept the cars, and also to recover a balance due on other transactions between them. G. obtained a verdict for \$160 in March, 1884, on the special count, with leave to move to enter a verdict also on



the count for money had and received, which was granted, and in June, 1885, judgment was signed for \$5,035. In April, 1884, G. assigned to L. all his interest in his claim against H. and in the judgment that might be signed, and notice of this assignment was given to H. in May, 1884. In February, 1885, G. gave a confession to H. for the amount of the account due by him to H. and judgment was then signed by H. against G. for \$3,244.

On an application by H. to set off the amount of his judgment against the judgment recovered against him by G. (the difference between the two judgments having been paid by H. to G.'s attorney with consent of G. and L.)

*Held*, per ALLEN, C. J., PALMER, KING, and FRASER, JJ., (WETMORE, J., dissenting) that under the circumstances H. was entitled, notwithstanding the notice of assignment, to have his judgment set off against the judgment of G.

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### SMITH v. CORMIER.

*Foreclosure of mortgage—Staying proceedings—Whether defendant entitled to statement of the amount due before appearance—Consol. Stat. c. 49, s. 111.*

Where a suit has been commenced for foreclosure of a mortgage, the defendant offering to pay the amount due is entitled under the Consol. Stat. c. 49, s. 111, to be furnished with a detailed statement of the amount of principal, interest, and costs; and, on payment of the amount, to have the suit stayed, without entering an appearance.

Where a plaintiff refuses to give such statement, or to produce the bond and mortgage to the Judge in Equity, he has the right to refer the matter to a barrister to ascertain the amount due.

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### REGINA v. GRIMMER.

*Canada Temperance Act—Conviction—Certiorari—Procedendo.*

Where a conviction under the second part of the Canada Temperance Act has been removed by *certiorari* and afterwards affirmed, a *procedendo* will issue to carry back the record of the proceedings to the magistrate in order that he may enforce the conviction.

## REGINA v. WHITE.

*Canada Temperance Act—Conviction—Certiorari—Procedendo.*

Where proceedings have been removed into this Court by *certiorari*, it is not necessary to take out a rule to take the return off file before applying for a *procedendo*; it being sufficient that leave has been granted to remove the return from the files.

Where a conviction has been removed by *certiorari* and affirmed, the Court will not on an application for a *procedendo* to the convicting Justice, examine into the validity of the conviction on grounds not taken on the motion to quash it.

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Ex parte MERCER.*Canada Temperance Act—Order in Council bringing Act into force—  
Evidence of.*

The introductory part of the Annual Statutes of Canada, containing a statement that an Order in Council had been made bringing the Canada Temperance Act into force in a county, is not evidence of the making of such order.

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FRANKE v. McGRATH.*Injunction—Dissolution of on giving security—How security affected by  
dismissal of bill—Discretion of Judge as to costs on dismissal—Right  
of Court of Appeal to vary.*

A. and B., residing in New York, entered into partnership in March, 1880, for the purpose of cutting and storing ice in this Province, and shipping it to New York or elsewhere for sale, provision being made for the advance of money by B. and the division of the proceeds on the sale of the ice; B. to have the option of purchasing out A.'s right at a fixed sum per ton of the ice. After part of the ice had been cut, they entered into a new agreement in April, whereby the partnership was dissolved, and A. was to superintend the cutting,

storing, and shipping of the ice, which was to be B.'s property, who was to sell it to such parties, and on such terms as he should think advisable, and out of the first sales pay all expenses, including the expense of sending the ice to market, after which he was to pay half the profits to A. Soon after making the second agreement, and while the ice was in store in this Province, B. sold it to C., who had notice of the agreements between A. and B., and that A. claimed an interest in the ice, and disputed B.'s right to sell it. A. then filed a bill against B. and C., alleging the sale to have been made for the purpose of defrauding him; and he obtained an *ex parte* injunction to restrain the removal of the ice. The injunction was dissolved on C.'s giving security to pay any amount which might be found to be due to A. At the hearing of the case the bill was dismissed as against C.,—the charge of fraud against him not having been proved,—but it was dismissed without costs, the Judge being of opinion that by the agreements between A. and B., the ice was to be shipped abroad, and that C. having purchased with notice of the agreements, was bound to know that B. in selling the ice here was violating his agreement. The Judge also refused to order the security to be delivered up to C.

*Held*, on appeal, by WETMORE, KING, FRASER, and TUCK, JJ. 1. That B.'s right to sell the ice was unlimited, and he was not bound to ship it abroad; and that there was no equity making C. responsible for B. paying to A. his share of the purchase money—A.'s only remedy being a money demand against B. on the agreement.

2. That A. was not entitled to the injunction to restrain C. from removing the ice; and therefore the security given by C. to obtain the dissolution of the injunction ought to be given up to him.

3. That the bill should have been dismissed as against C. with costs—he having been a *bona fide* purchaser of the ice, and the charge of fraud against him not having been proved.

4. That though ordinarily costs in equity are in the discretion of the Court, such discretion must be governed by certain fixed principles; and that the Court of Appeal could vary the order of the Court below in respect to the costs.

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## SHERATON v. SHERATON.

*Trust deed—Trust for benefit of husband and wife—Release by husband—Separate property of wife—Fraudulent conveyance.*

A. S. conveyed property in trust for the benefit of his creditors, preferring, *inter alios*, R. S. for the sum of \$6,281, and his wife for \$4,853. By the terms of the deed the creditors who signed it released A. S. from all claims and demands up to that date. R. S. signed the deed. The trustees having offered the property for sale, it was bought in for R. S. for the sum of \$24,050; but differences arising between him and the trustees, he commenced a suit in equity to compel them to complete the sale, whereupon an order was made by consent in September, 1883, appointing a receiver of the proceeds of the sale, R. S. guaranteeing the trustees that the property would produce \$24,050 in certain stated sums in three, six, and nine months; and on that sum being realized from the sales, it was agreed that the receiver should transfer to R. S. any balance of the property that might remain. The property was sold, and the proceeds paid to the receiver from time to time; but it did not appear, after the lapse of nearly nine months, how much had been received from the sales. Immediately after making the order appointing the receiver, R. S. commenced an action against A. S. and recovered a judgment by default for the amounts claimed by R. S. and his wife, being the sums directed to be paid to them by the trust deed. On an application by a subsequent judgment creditor of A. S. to set aside this judgment as fraudulent:

*Held*, 1. That R. S. having released A. S. by the trust deed from all debts, there was no consideration to support the judgment as to his claim.

2. That it not being shewn what amount had been realized by the sale of the property under the order in equity, or the value of the property unsold, there was no proof that the debt due to R. S.'s wife had not been paid by such sale or property; and that the *onus* of proving that fact was on R. S.

*Quære*, whether the debt due to R. S.'s wife was not released by his executing the trust deed—it not being shewn to be her separate property under the Consol. Statutes c. 72.

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## SHERATON v. SHERATON.

*Trust deed—Release of debts—Fraudulent judgment—Failure of consideration—Trustee and cestui que trust.*

S. executed a deed of property in trust for the benefit of certain creditors, who thereby released him from all claims and demands. A suit in equity having afterwards been brought to set aside the deed as fraudulent, he confessed a judgment to one of the creditors named in the trust deed, who signed a paper stating that he held the judgment for the benefit of himself and other persons named (who were also named in the trust deed as creditors of S.) for specified sums. It did not appear that these persons knew that the judgment had been given, nor was there any proof that the sums specified were due to them.

On an application by a subsequent judgment creditor of S. to set aside the judgment as fraudulent,

*Held*, 1. That there was no consideration to support the judgment in the case of any creditor who had signed the trust deed.

2. That until the persons for whose benefit the judgment professed to have been given assented to it, the relation of trustee and *cestui que trust* did not exist between them and the holder of the judgment.

3. Where it is not clearly shewn that a person in whose favour a judgment is confessed is a *bona fide* creditor for a certain sum, the judgment will not be sustained against a subsequent judgment creditor.

See the preceding case.

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RANNEY v. SHERATON.

*Trust deed for the benefit of creditors—Further assurance—Judgment to defraud creditors—Want of consideration.*

S. being indebted to a number of persons, conveyed to the plaintiff property in trust to sell, and pay certain creditors named in the trust deed, and to pay any surplus to such of his creditors as should execute the deed within a certain time; and he covenanted that he would on request execute such further assurance of the trust property as counsel

should advise. The deed contained a release by the creditors who executed it, of all their claims and demands against S. Afterwards, certain creditors of S. who were not named in the trust deed, and who had not signed it, filed a bill in equity to set aside the deed as fraudulent, the proceedings in which suit were pending. Soon after this S. confessed a judgment in favour of the plaintiff for a large amount—the proceeds of which were to be divided among the creditors named in the trust deed, upon which judgment execution was issued against the property of S.

*Held*, 1. That the judgment was fraudulent and void against the creditors of S. who had not signed the trust deed—the persons for whose benefit it was given having previously released all their claims against S.

2. That the judgment was not a further assurance within the terms of the trust deed—it being a security on other and different property than that conveyed thereby.

3. That the pendency of the suit to set aside the trust deed did not affect the application to set aside the judgment.

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## MANITOBA.

In the Queen's Bench.

KING v. KUHN.

*Chattel mortgage not renewed—Purchaser with notice.*

The defendant held a chattel mortgage upon some oxen. It was filed ; but after the lapse of two years not refiled. The plaintiff after that period bought the oxen with notice that the mortgage was not paid.

*Held*, that as against the plaintiff the mortgage was valid and effectual.

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## WOOD v. BIRTLE.

*Tax sale—Advertisement—Injunction.*

Lands were advertised for sale for taxes in two numbers of the *Gazette*, but those numbers, although dated upon certain days, did not in fact issue until later dates—dates too late to comply with the statute. Upon a motion for an injunction to stay the sale,

*Held*, that the statute was not sufficiently complied with ; but

2. That insufficient advertising would not, under the present statutes, render the sale void, and that therefore no injunction to stay it should be granted.

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## CLEAVER v. MUNICIPALITY OF BLANCHARD.

*New trial—Verdict under £20.*

A new trial will not be granted on the ground that the verdict was against the weight of evidence, where the verdict is under £20.

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## FOOTE v. MUNICIPALITY OF BLANCHARD.

*Distress for taxes—Demand—Pleading.*

The defendants' treasurer served a demand for payment of taxes upon the plaintiff. A portion of the total amount demanded was not properly chargeable; but one of the items, viz., the taxes for 1884 were legally due, and appeared separately and clearly specified.

*Held*, that there was no sufficient demand, even for the 1884 taxes.

2. If the demand could have been sustained a seizure and sale for the whole amount would have given the plaintiff an action for excessive seizure and sale only.

3. Justification for trespass in such a case must be pleaded.

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## NORTH-WEST NAVIGATION CO. v. WALKER.

*Navigable rivers—Obstructions—Reasonable use—Negligence.*

The judgment of Taylor, J., 4 Man. L. R. 406, was affirmed upon appeal to the full Court.

## FRONTENAC LOAN CO. v. MORICE.

*Administration—Priority of judgment creditors—Assignment for benefit of creditors set aside, but reference to master as to creditors' liens.*

A decree in a mortgage suit contained no order for payment of money, but directed writs of *fiery facias* to issue for the amount due.

*Held*, that the mortgagee was not a judgment creditor, and therefore not entitled to any priority in the administration of the assets of the mortgagee.

An administrator executed an assignment of certain assets for the payment of certain scheduled creditors.

Upon the evidence the assignment was set aside as between the assignor and assignee, but there was a reference to the Master to ascertain whether any of the creditors were entitled to any lien or charge upon the fund assigned.

## O'DONOHUE v. SWAIN.

*Action on promissory note—Part failure of consideration.*

To an action upon a promissory note the defendant shewed that it was given in part payment of a binding machine. He had, however, kept the machine, used it for two years, and not offered to return it. He claimed that the plaintiff had agreed to furnish him with repairs for the machine.

*Held*, 1. That the defective character of the machine could be no defence to an action upon the note.

2. That no action for failure to furnish the repairs could be sustained, because the contract contained certain conditions which were not performed by the defendant, and which were conditions precedent to his right to make any claim under it.

## O'DONOHUE v. FRASER.

*County Court—Counter-claim—Jurisdiction under power to administer according to equity and good conscience.*

Action upon a note given for a binding machine; counter-claim for non-performance of an agreement to furnish repairs. By the written contract provision was made for the case of



defective portions of the machine. The evidence did not support a case under the written contract, and the agent who was alleged to have made a verbal agreement had no power to do so.

*Held*, that under Con. Stat. Man. c. 34, s. 41, authorizing in any case not expressly provided for the application of "the law and the general principles of procedure or practice in the Court of Queen's Bench," the County Court had jurisdiction to consider a counter-claim sounding in damages.

2. That the defendant having no right acknowledged by the principles of either law or equity, the Judge of the County Court had no power to award him damages under the Act authorizing him to make such orders, judgments, or decrees thereupon as appear to him just and agreeable to equity and good conscience.

An appellant from the County Court succeeded in his appeal, but the principal points raised and argued by his counsel were decided against him.

*Held*, that there should be no costs of the appeal or of the application to the County Judge after the trial to reverse his judgment.

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## Supreme Court of Canada.

ONTARIO.]

### EXCHANGE BANK v. SPRINGER.

*Principal and surety—Cashier of bank—Buying and selling stocks—  
Negligence of directors.*

In an action against the sureties of an absconding cashier it appeared that the bank had become possessed of certain stock, on the security of which advances had been made, and to save loss the stock was put on the market and other stock bought to affect the price. An account was kept in the books of the bank called the "C. R. M. trust account," in which these stock transactions were recorded. The cashier used this account to assist him in some private speculations, and having become a defaulter in a large amount he absconded.

*Held*, affirming the judgment of the Court below, 13 A.R. 390, that even if this dealing in stocks by the bank was illegal it would not relieve the sureties of the cashier from liability on their bonds.

*Robinson, Q.C., and E. T. Malone*, for the appellants.

*Bain, Q.C.*, for the respondents.

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QUEBEC.]

PEOPLE'S BANK v. EXCHANGE BANK OF CANADA.

*Bank, liability of—Acceptance of cheques by cashier and president at a future date.*

In 1881 G., having business transactions with the Exchange Bank, agreed with C., president and manager of the bank, that in lieu of further advances, the bank would accept his cheque, but made payable at a future date. On the 19th October, 1881, G. drew a cheque on the Exchange Bank and had it accepted as follows:—"Good on 19th February, 1882. T. Craig, President;" got the cheque discounted by the People's Bank and deposited the proceeds to his credit in the Exchange Bank. This cheque was renewed on the 23rd May, and it was presented at the Exchange Bank and paid. Thereupon another cheque for the same amount was accepted in the same way and discounted by the People's Bank on the 7th September, 1883. At the time of the suspension of payment by the Exchange Bank, the People's Bank had in its possession four cheques signed by G. and accepted by T. Craig, President of the Exchange Bank, which were subsequently presented for payment on the dates when they were payable and duly protested, and also after the three days of grace.

The total amount of these cheques amounted to \$66,020.64 and one of them, viz., the one dated 7th September, 1883, for \$31,000, was a renewal of the cheque the proceeds of which had been paid to the credit of G. in the Exchange Bank. C. was manager as well as president of the Exchange Bank.

In an action brought by the People's Bank against the Exchange Bank for the recovery of the sum of \$66,020.64 based on the four cheques in question, the Exchange Bank

pleaded *inter alia* that C. had not acted within the scope of his duties and within the limits of his powers and that the bank had never authorized or ratified his acceptance of G.'s cheque.

*Held*, affirming the judgment of the Court of Queen's Bench, STRONG, TASCHEREAU, and GWYNNE, JJ., dissenting, that under the circumstances the Exchange Bank was liable for the acceptance by their president and manager of G.'s cheques discounted by the People's Bank in good faith and in due course of business.

*MacMaster*, Q.C., for the appellants.

*Geoffrion*, Q.C., for the respondents.

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## UNION BANK OF LOWER CANADA v. BULMER.

*Promissory note—Accommodation—Partner acting without authority—  
Renewal—Knowledge of holder.*

In an action on a promissory note the defence was that the note of which it was a renewal was given for the accommodation of the payee by the defendant's partner, who had no authority to make it, and that the plaintiffs when they took the renewal knew of its defective character.

*Held*, that, as it did not appear that such knowledge attached when the original note came into the plaintiffs' possession, they were entitled to recover.

*Irvine*, Q.C., for the appellants.

*A. W. Atwater*, for the respondent.

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## GILLESPIE v. STEPHENS.

*Reddition de comptes—Settlement by mandator with his mandatory without  
vouchers, effect of—Action en redressement de comptes.*

*Held*, affirming the judgment of the Court below, that if a mandator and a mandatory, laboring under no legal disability, come to an amicable settlement about the rendering of an account due by the mandatory, without vouchers or any formality whatsoever, such a rendering of account is perfectly legal, and that if subsequently the mandator dis-

covers any errors or omissions in the account his recourse against his mandatory is by an action *en redressement de comptes*, and not by an action asking for another complete account.

*Fleming*, Q.C., and *Nicolls*, for the appellant.

*Carter*, for the respondent.

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NOVA SCOTIA.]

### DUFFUS v. CREIGHTON.

*Sheriff—Action against—Execution of writ of attachment—Abandonment of seizure—Estoppel.*

A writ of attachment against the goods of M. in the possession of S. was placed in the sheriff's hands and goods seized under it. After the seizure the goods, with the consent of the plaintiff's solicitor, were left by the sheriff in charge of S., who undertook that the same should be held intact. The sheriff made a return to the writ that he had seized the goods. The sheriff subsequently sold the goods under executions of the creditors. In an action against the sheriff.

*Held*, reversing the judgment of the Court below, that the act of leaving the goods in the possession of S. was not an abandonment by the plaintiff's solicitor of the seizure, and if it was, the sheriff was estopped by his return to the writ from raising the question.

*Held*, also, that the fact of the plaintiff's solicitor acting as attorney for S. in a suit connected with the same goods was not evidence of an intention to discontinue proceedings under the attachment.

*Russell*, for the appellants.

*Gormully*, for the respondent.

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### CASSELS v. BURNS.

*Ships and shipping—Charter party—Damage to ship—Nearest port—Deviation.*

A ship sailed from Liverpool in September under charter to load lumber at Bathurst, N. B. Having encountered

heavy weather, the captain found it necessary to make repairs and proceeded to St. John for that purpose. By the time the repairs were completed it was too late to go to Bathurst and carry out the charter. In an action against the owners for breach of charter the plaintiff obtained a verdict, the jury finding that the repairs could have been made in Sidney, C. B., and if made there could have been complete in time to load at Bathurst.

*Held*, affirming the judgment of the Court below, 20 N. S. Rep. 13, that going to St. John to repair the ship was such an unnecessary deviation from the voyage as to render the owners liable for breach of charter party.

*Skinner*, Q.C., for the appellants.

*W. Pugsley*, for the respondents.

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### ELLS v. BLACK.

*Trespass—Disturbing enjoyment of right of way—User—Easement.*

E. & B. owned adjoining lots, each deriving his title from S. E. brought an action of trespass against B. for disturbing his enjoyment of a right of way between said lots and for damages. The fee in the right of way was in S., but E. founded his claim to a user of the way by himself and his predecessors in title for upwards of fifty years. The evidence on the trial showed that it had been used in common by the successive owners of the two lots.

*Held*, affirming the judgment of the Court below, 19 N. S. Rep. 222, RITCHIE, C.J., and GWYNNE, J., dissenting, that as E. had no grant or conveyance of the right of way, and had not proved an exclusive user, he could not maintain his action.

*Sedgewick*, Q.C., for the appellant.

*Drysdale*, for the respondent.

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### MOONEY v. McINTOSH.

*Trespass—Title to land—Boundaries—Easement—Agreement at trial—Estoppel.*

In an action for damages for trespass by Mcl. on M.'s land and closing ancient lights, the defendant claimed title

in himself and pleaded that a conventional line between his lot and the plaintiff's had been agreed to by a predecessor of the plaintiff in title. On the trial the parties agreed to strike out of the pleadings all reference to lights and drains and to try the question of boundary only.

*Held*, affirming the judgment of the Court below, RITCHIE, C.J., and GWYNNE, J., dissenting, that independently of the conventional boundary claimed by the defendant, the weight of evidence was in favour of establishing a title to the land in question in the defendant, and the plaintiff could not recover, and that by the agreement at the trial the plaintiff could not claim to recover by virtue of a user of the land for over twenty years.

*Semble*, that if it was open to him such user was not proved.

*Sedgewick*, Q.C., for the appellants.

*Henry*, Q.C., for the respondents.

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NEW BRUNSWICK.]

### GREENE v. HARRIS.

*Set-off—Cross judgments—Equitable assignment.*

G. and H. brought counter-actions for breaches of agreement. In March, 1884, G. obtained a verdict with leave to move for increased damages, which he succeeded in obtaining, and in June, 1885, he signed judgment. In April, 1884, G. assigned to H. all his interest in the suit against H. and gave notice of such assignment in May, 1884.

In February, 1885, H. signed judgment against G. on confession.

*Held*, reversing the judgment of the Court below, 25 N. B. Rep. 451, STRONG, J., dissenting, that H. could not set off his judgment against the judgment recovered against him by G. and assigned to H.

*Weldon*, Q.C., for the appellant.

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## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

C. C. NORFOLK.]

[29TH SEPTEMBER, 1887.]

## FORSE v. SOVEREEN.

*Landlord and tenant—Assignment for value without notice—Reformation of lease—Termination of tenancy by intervention of mortgagee.*

In an action of replevin for goods seized under a distress for rent, the plaintiff claimed that there was nothing in arrear. He proved the payment of certain sums to the solicitor of the first mortgagee, and also claimed a deduction of \$15 for a quantity of manure expended on the demised premises under an alleged agreement with the lessor. The seizure was made by the defendant S., to whom the landlord had assigned the plaintiff's lease as collateral security for payment of a second mortgage. The lease did not express what was held at the trial to be the true agreement, that manure was to be supplied and \$15 deducted from the rent during each year of the tenancy.

*Held*, that the lease ought not to have been reformed as against S., who was a *bona fide* purchaser for value without notice of the facts on which the plaintiff's equity depended.

*Held*, also, that although a new contract of tenancy may be inferred from a notice by the mortgagee to pay rent to him, acquiesced in by the tenant by payment of the rent, yet, as the circumstances of this case shewed that it was not intended to create such a contract, but rather that, the interest being paid, the possession of the mortgagor and his tenants was to remain undisturbed, it could not be said that the plaintiff's tenancy had been put an end to by the intervention of the first mortgagee.

*Aylesworth*, for the appellants.

*W. M. Douglas*, for the respondent.

C. C. MIDDLESEX.]

GRAHAM v. O'CALLAGHAN.

RUSSELL v. O'CALLAGHAN.

*Replevin—Value of goods lost or eloigned—Detention of goods—Damages.*

In an action of replevin, where the sheriff has been unable to replevy the articles mentioned in the writ by reason of their having been lost or eloigned by the defendant, the plaintiff may recover the value of the goods as damages, where the count is in the *detinet* as well as the *detinuit*.

Special damages are recoverable for the trespass to the goods actually replevied, and the plaintiff is not confined to nominal damages, usually given for the costs of the replevin bond.

Under the circumstances of this case the jury were warranted in giving special damages.

*Moss, Q.C.*, for the appellant.

*R. M. Meredith*, for the respondents.

C. C. ELGIN.]

HOGG v. ELWOOD.

*Verdict of jury—Findings of referee—Interference by Court.*

In an action for wages there was a dispute between the parties as to the nature of the agreement for hiring. There was evidence at the trial which would have supported a finding for either party. The question was wholly one of fact and of the credibility of witnesses. The jury found in favour of the plaintiff; but the Judge set aside the verdict, and sent the case to a referee, who found substantially as the jury had done. Upon motion the Judge made an order sending the case back to the referee with instructions to find against the plaintiff upon one branch of the case.

*Held*, that the case was one specially proper for the decision of a jury, and that the verdict and finding of the referee should not have been interfered with.

*J. A. Robinson*, for the appellant.

*Doherty*, for the respondent.



## IN CHAMBERS.

[OSLER, J. A., 17TH SEPTEMBER, 1887.]

*In re* PRINCE EDWARD COUNTY DOMINION  
ELECTION PETITION.*Controverted Election—Deposit required at nomination—Agent of candidate  
—37 V. c. 9, s. 121.*

37 V. c. 9, s. 121, does not apply to the deposit of \$200 required to be made at the time of nomination of a candidate for election to the House of Commons of Canada; such deposit may be made by nominators or by any person on their behalf.

Motion by the petitioner to strike out the preliminary objections of the respondent to a petition filed under the Dominion Controverted Elections Act.

The third paragraph of the petition stated that the member elect was not duly nominated as a candidate for the electoral district on several grounds, one of which was as follows:

“That at the time that the said pretended nomination paper of the said John Milton Platt (the member elect) was filed with the said returning officer, the sum of \$200 was not deposited in the hands of the said returning officer, or if deposited in fact was an illegal payment or deposit, as not having been made by the duly appointed election agent or agents of the said John Milton Platt, or one of such agents.”

To this part of the petition the respondent set up by way of preliminary objection:

“1. That the matters set out in the third paragraph of the said petition are not facts or grounds on which the said petitioner can rely in support of the said petition, and that the alleged facts stated in the said third paragraph should not have been stated in the said petition and are irrelevant and embarrassing.

“2. That the said respondent was duly nominated as a candidate for the said electoral district, that his nomination paper and all matters connected therewith were duly accepted by the said returning officer and that the alleged irregularities in connection with the said nomination can not now be inquired into in this petition.”

In support of the preliminary objections the respondent filed affidavits shewing that the returning officer had given a receipt for the deposit of \$200 required by the statute.

*A. R. Creelman*, for the petitioner. 37 V. c. 9, s. 121, makes the deposit of the \$200 by a person other than the duly appointed agent of the candidate illegal.

*J. M. Clark*, for the respondent. S. 121 does not apply to the deposit required by s. 19; such deposit may be made by any one or more of the nominators. S. 19 makes the receipt of the returning officer sufficient evidence of the deposit, and the petitioner cannot go behind this receipt.

OSLER, J. A., held that s. 121 did not apply to the deposit of \$200 required to be made at the time of nomination; that it might be made by nominators or by any person on their behalf. He allowed the preliminary objections and struck out the paragraph of the petition objected to.

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## High Court of Justice.

### QUEEN'S BENCH DIVISION.

[ARMOUR, J., 3RD NOVEMBER, 1887.]

### REGINA v. McGAULEY.

*Indian Act, s. 108—"Appeal brought"—Time.*

The Indian Act, R. S. C. c. 43, s. 108, provides that no appeal shall lie from convictions under that Act except to a Judge of a Superior Court, etc., "and such appeal shall be heard, tried, and adjudicated upon by such Judge without the intervention of a jury, and no such appeal shall be brought after the expiration of thirty days from the conviction."

*Held*, that the words "appeal brought" were entirely satisfied by the notice of appeal having been given and the appeal having been perfected by the giving of the security provided for by the Summary Convictions Act within the

thirty days ; and that it was not necessary for the appellant to bring his appeal to a hearing within the thirty days.

*In re Hunter v. Griffiths*, 7 P. R. 86, not followed.

*Laidlaw*, Q.C., for the defendant.

*Kehoe*, for the prosecutors.

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## COMMON PLEAS DIVISION.

[WILSON, C. J., 23RD SEPTEMBER, 1887.]

### REGINA v. ATKINSON.

*Canada Temperance Act—Police magistrate for county—Towns containing 5,000 population—Evidence—Defect in summons—R. S. O. c. 106, s. 117.*

Conviction under the Canada Temperance Act. The information was laid before J. K., who described himself as "one of Her Majesty's Police Magistrates in and for the county of Oxford," and the summons and conviction gave the like description. His commission was issued on the 12th January, 1887, and described him as police magistrate for the county of Oxford. Woodstock and Ingersoll are two towns in the county ; and it was urged that the population of each is and was at the time of the complaint more than 5,000, so that each should under R. S. O. c. 72, s. 1, have a police magistrate of its own, that it therefore must be presumed that each had a police magistrate at such time, and therefore that J. K., who was appointed police magistrate for the county, could not be such for the county including these towns.

*Held*, that there was no evidence to shew that Woodstock and Ingersoll contained each 5,000 inhabitants, and it could not judicially be said that such was the fact ; that if the circumstance of J. K. describing himself as one of the police magistrates for the county shewed that there was more than one police magistrate, there was nothing to shew that J. K. was not appointed first, and the subsequent appointments would be the ones that were invalid.

The summons required the defendant to appear before the police magistrate "or such Justice of the Peace as may then

be there, to answer to the said information." The police magistrate who issued the summons was himself present to hear, and did hear, the complaint; and the defendant appeared there also, and pleaded "not guilty."

*Held*, following *Regina v. Durnin*, that under R. S. O. c. 106, s. 117, that defect in the summons did not render the conviction invalid and incurable.

*Held*, also, that on the evidence the Canada Temperance Act was in force in the county.

*Mackenzie*, Q.C., for the defendant,  
*Delamere*, for the Crown.

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### McDERMOTT v. REDDICK.

*Mortgage—Will—Appointment—Interest.*

A mortgage was made on 14th December, 1867, by T. R. to his father. The proviso for payment was that the mortgage was to be void on payment of \$800 unto the executors or administrators of the mortgagee in eight equal annual instalments of \$100 each, the first of such instalments to be paid one year after the mortgagee's decease, upon trust to and for such executors and administrators to pay the same to such person or persons as the said mortgagee shall by deed endorsed hereon or otherwise by deed direct and appoint, and in default of any such appointment, and so far as no such appointment shall extend, in trust to pay the same to the children of the said mortgagee other than the said mortgagor in equal shares, and in case of the death of any of the said children without lawful issue the proportion of such child to be equally divided amongst the survivors, and in case of lawful issue such issue to stand in the place of his or her parent.

The mortgagee made no appointment by deed, but in his will he said, "Understanding that the sum of \$800 coming to my heirs and assigns from my estate, consisting of, etc., has not been specified as to which or whom of my heirs it is payable or when it shall be paid;" and he directed that it should be thus disposed of, viz., to his daughters A., M. and B.

each \$200; to his granddaughter A. K. \$100; and to his wife \$100; and that the said sums should be paid forthwith after his death.

*Held*, that the will constituted a valid appointment under the proviso in the mortgage, and that the legatees or appointees under it were entitled to the sums bequeathed to them, and that the time for the payment of the money must be in accordance with the terms of the mortgage.

The mortgage was on a printed statutory form; the proviso was for payment of the \$800, the printed words, "with interest" being struck out; but the mortgagee covenanted to "pay the mortgage money and interest and observe the above proviso;" and there were the usual provisos as to distress for arrears of interest, principal becoming due on non-payment of interest, etc.

*Held*, that no interest was payable until after each instalment of principal became due, if the payment thereof should be delayed.

*F. S. Wallbridge*, for the plaintiff.

*C. J. Holman* and *F. E. Reddick*, for the adult defendants.

*W. H. P. Clement*, for the infants.

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[ROSE, J., 27TH SEPTEMBER, 1887.]

### AYERS v. CORPORATION OF WINDSOR.

*Municipal corporation—Lowering grade of street—Negligence—By-law.*

In an action to recover damages for injury sustained by the plaintiff by lowering the grade of the street in front of his store, claiming that there was negligence and also that the work was done without a by-law,

*Held*, that on the evidence no negligence was proved, but that, as the work was done without a by-law, the action was maintainable.

*D. Dougall*, for the plaintiff.

*McHugh*, for the defendants.

[4TH NOVEMBER, 1887.]

## ROGERS v. WILSON.

*Mortgagor and mortgagee—Assignment to third person—49 V. c. 20, s. 7.*

An action upon a mortgage of real estate, for sale and the usual remedies.

Motion by the defendant to stay proceedings upon the ground that the amount due was tendered to the plaintiff after action brought. The amount tendered was not accepted by the plaintiff, because the defendant would not be satisfied with a simple discharge of the mortgage, but asked to have it assigned to a third person. The plaintiff had a second mortgage, not in default, on the same property and did not wish to have the prior mortgage kept alive.

C. C. Robinson, for the defendant, relied upon 49 V. c. 20, s. 7 (1), which says: "Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of giving a certificate of payment or re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly."

A. M. Taylor, for the plaintiff, contra.

Rose, J., held that the plaintiff was not bound to give an assignment of his first mortgage so as to imperil his interest under the second mortgage, notwithstanding the provisions of the Act. The defendant was not entitled to redeem without redeeming both mortgages.

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IN CHAMBERS.

[WILSON, C. J., 16TH SEPTEMBER, 1887.]

## HILLYARD v. SWAN.

*Judgment—Setting aside—Judgment to stand as security—Execution.*

The plaintiffs signed judgment on default of appearance in an action for a money demand, and the defendant was after-

wards upon application to a local Judge let in to defend upon the merits, upon certain conditions, one of which was "the judgment and execution (*fi. fa.* goods) now in force to stand as security to the plaintiffs unless and until the defendant pays into Court the amount of the plaintiffs' claim or gives security therefor." The defendant did not pay into Court or give security. The action was tried and a verdict given for the plaintiffs, subject to a reference to ascertain the proper amount due to the plaintiffs, and the referee found a less amount due than that for which judgment had originally been entered. After verdict and before the finding of the referee the plaintiffs issued and delivered to the sheriff a *fi. fa.* against the lands of the defendant on the original judgment.

*Semble*, the original judgment could not stand when the case was reopened and the defendant let in to defend. But, as the parties had treated the judgment as standing,

*Held*, that it and the *fi. fa.* goods should be reduced to the sum found by the referee, instead of entering a new judgment; but that the issue of the writ of *fi. fa.* lands was quite unwarranted, and the writ should be set aside.

*Walter Read*, for the defendant.

*Shepley*, for the plaintiffs.

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[BOYD, C., 26TH SEPTEMBER, 1887.]

### PLATT v. GRAND TRUNK R. W. CO.

*Costs—Taxation—Appeal—Copies of opinions of Judges—Objections.*

Upon an appeal to a Judge in Chambers from the taxation of costs by a local taxing officer, where the bill was referred to one of the taxing officers at Toronto as upon a revision;

*Held*, that there should be no costs of the appeal and revision unless success was substantially with one party or the other.

Charges for procuring copies of opinions of Judges in another action for the instruction of counsel should not be taxed as between party and party.

An appeal should not be allowed as to any item not included in the objections put in to the taxation.

*T. Langton*, for the plaintiff.

*H. Cassels*, for the defendants.

[28TH SEPTEMBER, 1887.]

### WARNOCK v. PRIEUR.

*Foreclosure—Opening—Irregularities—Lunatic defendant—Appointment of guardian ad litem—Chambers judgment—Rule 69—G.O.O. Chy. 434, 645.*

In a mortgage action for foreclosure a local Master appointed the Official Guardian to represent a lunatic defendant as guardian *ad litem*, without notice being served as directed by Rule 69. The guardian made full inquiries, communicated with the relatives of the lunatic, and put in the usual formal defence on behalf of the lunatic; and a judgment of foreclosure was obtained in Chambers against all the defendants, including infants and the lunatic defendant.

*Held*, that the order appointing the guardian was an erroneous one for which there was no proper foundation, not a mere irregularity which could be held to be waived by the subsequent steps taken to protect the lunatic's rights.

*Held*, also, that the term "adult" in G. O. Chy. 645 does not include a lunatic or person of unsound mind; and therefore that a judgment against a lunatic could not be obtained in Chambers under G. O. Chy. 434.

The judgment of foreclosure was set aside.

*Foy, Q.C.*, and *E. Taylour English*, for the defendants.

*J. MacLennan, Q.C.*, for the plaintiff.

### PIERCE v. PALMER.

*Statement of claim, delivery of—Irregularity—Waiver.*

Upon the defendant's application to dismiss the action for want of prosecution, an order was made on the 6th May that upon payment by the plaintiff of \$20 costs within eighteen



days and upon his delivering his statement of claim within the same time, the defendant's application was dismissed. On the 26th May, after the expiry of the eighteen days, the plaintiff filed his statement of claim, delivered a copy to the defendant's solicitors, and tendered them \$20, which they refused to accept. They also declined to admit service of the statement of claim, but retained it in their possession. On the 3rd June an order was made extending for one week the time for filing and delivering the statement of claim and paying the \$20. This order did not provide that the statement of claim already delivered should stand. Within the week the plaintiff paid the \$20, and nine days afterwards signed judgment against the defendant for default of defence, upon the statement of claim delivered on the 26th May.

*Held*, affirming the decision of the Master in Chambers, that the plaintiff was wrong in filing and serving his statement of claim before paying the costs; but this irregularity was waived and the service became effective when the costs were afterwards received. they being paid under the order of the 3rd June.

*Hoyles*, for the plaintiff.

*C. J. Holman*, for the defendant.

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[GALT, J., 17TH OCTOBER, 1887.]

### GARNER v. TUNE.

*Counter-claim—Close of pleadings—Notice of trial—Rule 180.*

The defendants by counter-claim delivered a reply, which contained more than a mere joinder of issue, to the statement of defence and counter-claim of the original defendants. No subsequent pleading having been delivered, the defendants by counter-claim, after the lapse of four days, served notice of trial.

*Held*, that the pleadings were not closed and the notice of trial was therefore irregular. The plaintiffs by counter-claim were entitled under Rule 180 to twenty-eight days from the delivery of the defence and counter-claim in which to amend.

*Beck*, for the defendants by counter-claim.

*Echlin*, for the original defendants.

[19TH OCTOBER, 1887.]

## McMASTER v. MASON.

*Discovery—Examination of witness—Production of documents—Fraud—  
Rules 109, 285.*

In an action of ejectment, where the plaintiff claimed title under a conveyance from the father of the defendant in 1885, and the defendant claimed by virtue of possession since 1874 under a verbal agreement to purchase made with his father, and the defendant said on his examination that he had paid his father money on account of the purchase, which he had entered in his father's books, an order was made for examination of the father and production of his books for the purpose of discovery before the trial.

*Held*, that the father might have been made a party under rule 109, on the ground of his having been a party to a fraud in conveying land to the plaintiffs after he had made an agreement with his son; and such being the case there was no doubt of his liability to be examined under Rule 285.

*Walter Macdonald*, for the plaintiffs.

*F. E. Hodgins*, for the defendant.

[PROUDFOOT, J., 3RD OCTOBER, 1887.]

## REID v. MURPHY.

*Interpleader—Sale of goods—Sheriff's charges.*

By an order made upon an interpleader application a sheriff was directed to sell the goods in question and pay the proceeds into Court, less his possession money and expenses of seizure and sale. The sheriff did so; the interpleader issue was tried and resulted in favour of the claimant.

An order was then made in Chambers directing that the sheriff should pay into Court the amount retained by him under the previous order, and that the execution creditor should pay the sheriff proper charges for possession money, etc.

*Held*, that this was the proper order to make.

*Bicknell*, for the sheriff.

*Hoyles*, for the claimant.

[4TH OCTOBER, 1887.]

## SNOWDEN v. HUNTINGDON.

*Costs—Taxation—Local taxing officer—Rule 447.*

Rule 447 applies to a taxation of costs conducted by a local taxing officer under the powers given him by 48. V. c. 13, s. 22, and an appeal from such taxation does not lie unless objections are carried in before the officer, as required by that rule.

*Quay v. Quay*, 11 P. R. 258, followed.

*Hoyles*, for the plaintiff.

*W. M. Douglas*, for the defendant Morris.

[FERGUSON, J., 17TH OCTOBER, 1887.]

## FOGG v. FOGG.

*Venue—Alimony action—Preponderance of convenience.*

The venue was changed from Whitby to Toronto in an action of alimony upon the application of the defendant where there was not sufficient difference in expense to warrant the change in an ordinary case, because of the rule in alimony cases which imposes on the defendant the burden of advancing and paying all the disbursements on both sides in any event.

The circumstance that two of the defendant's witnesses, who resided in Toronto, were public officers, and that their absence would be a public inconvenience was also considered in determining the preponderance of convenience.

*Chapple*, for the plaintiff.

*H. Cassels*, for the defendant.

[19TH OCTOBER, 1887.]

*In re* GABOURIE; CASEY v. GABOURIE.*Leave to appeal—Extension of time—Excuse for delay—Requirement of justice.*

Two of the defendants (legatees) in an administration suit appealed from the report of a Master and thereby succeeded

in charging the plaintiff, an executor, with their shares of a sum of \$4,000, which the executor had lost to the estate. The other defendants did not appeal, and as to them the report became absolute on the 24th March, 1887. Three of these defendants in September, 1887, after the success of their co-defendants' appeal was established, moved for leave to appeal and to extend the time, their excuse for the delay being that they had supposed the appeal of their co-defendants would enure to their benefit.

*Held*, that justice required that the time for appeal should be extended and these defendants let in to appeal upon their placing the executor in as good a position as he would have occupied if they had appealed within the time allowed ; notwithstanding that the \$4,000 was lost to the estate by an innocent mistake of the executor, that he had acted as he did by reason of the instructions given him by the testator, and his acting and taking advice according to the instructions had led directly to the mistake.

*Langdon v. Robertson*, 12 P. R. 139, followed.

*Birls v. Betty*, 6 Madd. 90, distinguished.

*J. Maclellan*, Q.C., for the plaintiff.

*Hoyles*, for the defendants.

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### McKAY v. KEEFER.

*Partition—Reference—Fees to experts—G. O. Chy. 240.*

In the course of a reference to make a partition of lands a Master appointed two skilled persons to examine the property and prepare a scheme of partition, and on their evidence he adopted the scheme prepared.

*Held*, that the course adopted by the Master was a reasonable one, that he had the power under G. O. Chy. 240 to take such course, and that the fees paid to the skilled persons by the defendant should be taxed to him.

*W. H. Blake*, for the defendant.

*Middleton*, contra.

[THE MASTER IN CHAMBERS, 16TH SEPTEMBER, 1887.]

WARD v. JACKSON.

*Notice of trial—Remanet from Assizes—Chancery Division Sittings.*

When a case has been made a *remanet* at the Assizes, a notice of trial for the Chancery Division Sittings is irregular and will be set aside.

*Aylesworth*, for the defendant.

*J. M. Clark*, for the plaintiff.

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NOVA SCOTIA.

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In the Supreme Court.

McILREITH v. DOULL.

*Assignment in insolvency—Retention of amount by assignee in excess of amount paid to other creditors—Duty of master in taking an account.*

The plaintiff having become insolvent, made an assignment for the benefit of creditors, whereupon one of the defendants was appointed assignee. The business was re-conveyed to the plaintiff on his undertaking to pay a composition on the amount of his indebtedness, for the payment of which another of the defendants became surety, and the plaintiff subsequently executed several assignments to the defendants to secure advances. The defendants having taken possession under the last mentioned assignments, the matters in difference between the plaintiff and defendants were referred to a master with instructions "to take an account and report the sum due from either party to the other of them."

The master having reported *inter alia* that the defendants, after paying the other creditors of the plaintiff their respec-

tive claims at the rate of sixty two and a half cents on the dollar, had paid to themselves the full amount of their claim, and that, being of opinion that the defendants were not entitled to any greater rate of dividend on their claim than that paid to the other creditors, he had disallowed the surplus with interest and had credited the same to plaintiff;

*Held*, that, under the authorities (*Higgins v. Pitt*, 4 Ex. 112, and *Howden v. Haigh*, 11 A. & E. 1035) the master was justified in making the deduction.

*Held*, also, that if he had failed to act as he did, it would have been the duty of the Court, under the authorities referred to, to give the plaintiff the benefit of the amount over-charged.

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### McKENZIE v. HARRIS.

*Appeal—Finding of trial Judge—Evidence—Fraudulent sale—Suspicious circumstances.*

The defendant as sheriff of the county of Pictou, levied upon a horse under a writ of execution issued on a judgment recovered against G. The plaintiff claimed damages, alleging that he had purchased the horse from G. prior to the receipt of the execution by the defendant.

At the trial judgment was given for the defendant on the ground that no *bona fide* contract for the purchase and sale of the horse was made between the plaintiff and G.

The plaintiff having appealed,

*Held*, that as there was enough evidence to sustain the judgment, particularly if the Judge believed the defendant and his witnesses, and as he had had an opportunity of seeing and hearing the witnesses and judging of their credibility, the appeal must be dismissed.

WEATHERBE, J., dissented on the ground that there was no evidence that the alleged sale was fraudulent, but that it merely showed suspicious circumstances.

## BRADY v. BELL.

*Sale of goods—Badges of fraud—Suspicious circumstances—Power of the Court to review erroneous findings.*

T. W. and J. W., his son, resided on a farm which they worked jointly, and upon which each had placed some stock.

In March, 1880, T. W. assigned to J. W. and J., another son, all his right and title to the farm, and all his interest in the cattle, sheep, etc., upon it, including a horse which he had purchased from S. a year previous, in payment for which he had given his note. The consideration for the assignment was the support and maintenance of T. W. and his wife during the remainder of their natural lives.

In June, 1880, T. W. was sued on the note by S. and judgment recovered against him and an execution issued, on which he was committed to jail. He obtained his discharge under the Indigent Debtors' Act in June, 1881. After the assignment the cattle remained on the farm in the custody of J. W. and J. until 21st December, 1881, when J. W., having determined to leave the farm, sold the cattle to the plaintiff and received the price agreed upon. J. W. then left the farm and did not subsequently exercise any acts of ownership over the cattle. The plaintiff, who was a miner and worked away from home, and was unable to care for the cattle, made an agreement with J. to do so for him.

S. commenced proceedings in Equity to set aside the conveyance from T. W. to his sons, and, having succeeded in doing so, an execution was issued for the costs, under which the cattle sold to plaintiff were levied upon. The sale to the plaintiff took place eighteen months before the issue of the execution, and there was no evidence to show that the plaintiff, when he bought, had reason to suspect that J. W. was not acting *bona fide* in the matter.

*Held, per* McDONALD, C. J., that there was no evidence to sustain a finding that the sale to the plaintiff was fraudulent and collusive.

*Per* THOMPSON, J., that the suspicious circumstances having been fully explained by the evidence, there was no ground to infer fraud, and nothing to be left to a jury.

*Per* RIGBY, J., that there was slight evidence of fraud, but in view of the whole testimony the conclusion of the Judge below was erroneous and should be reversed.

WEATHERBE, J., dissented.

Where the evidence on a trial is contradictory the Court will be slow to disturb the finding below, but otherwise where the question is as to the soundness of a conclusion arrived at on admitted facts, and it appears clearly that the finding is erroneous.

The Court will review a judgment founded on an inference of fraud more freely than where it is based on a conflict of testimony.

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### BLISS v. THE ÆTNA LIFE INS. CO.

*Insurance—Life—Assignment of policy direct to wife of insured—Title—  
New trial ordered—Amendment—Costs.*

R. P. B. effected two insurances upon his life with the defendant company. The first, for \$1,000, was made payable to his wife and children. The second, for \$1,500, was made payable to his executors, administrators, or assigns.

Prior to his death R. P. B. endorsed the second policy as follows: "I hereby hand over to my wife, her maiden name being S. J. S., all the interest in this policy for the benefit of herself and her children. R. P. B." Plaintiff sued on the two policies on behalf of herself and her children.

*Held*, that she was entitled to recover on the first policy, but not on the second.

An imperfect assignment from a husband to a wife cannot be regarded as a declaration of trust in her favour. The assignment of the second policy having been made directly to the wife was invalid to pass the title, and if the policy was held by the representative of the husband in trust for the wife the title would be solely in him, and he only would have the right to bring the action for the amount and give a valid discharge.

Assuming that a trust in favour of the children could be created by such an instrument, there was no trustee, as the



wife could not take a valid title from her husband, and she could not sustain an action as trustee for the children until she had been appointed by the Court.

A new trial was ordered on the second policy, the plaintiff to have the right to add parties within a time fixed, without payment of costs. The costs of the argument to abide the final result.

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BLAIR v. THE SOVEREIGN FIRE INS. CO.

*Insurance—Fire—Policy—Conditions—Limitation of time for bringing action.*

A policy of insurance issued by the defendant company on the plaintiff's house contained the following among other conditions :

“ Every suit, action, or proceeding against the company for the recovery of any claim, under or by virtue of this policy, shall be absolutely barred, unless commenced within the term of six months next after the loss or damage occurs.”

The premises insured under the policy were destroyed on the 4th October, 1883, and the action was not commenced until the 18th April, 1884.

*Held*, that, under the condition mentioned, notwithstanding another condition deferring the bringing of any action until after the expiration of sixty days from the completion of the proofs of loss, the plaintiff was precluded from recovering.

*Held*, also, that the words “ loss or damage ” in the condition must be taken to relate to the time of the occurrence of the fire.

McDONALD, C.J., dissented.

## MANITOBA.

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### In the Queen's Bench.

[FULL COURT.]

*In re* ST. ANDREW'S ELECTION.

*In re* LA VERANDRYE ELECTION.

*Election petition—Preliminary objection—Recognizance—Justice of the Peace.*

An objection that the recognizance for security for costs was taken before a Justice of the Peace is a preliminary objection. *In re St. Andrew's*, 7 C. L. T. 277, reversed.

Preliminary objections having been filed in proper time, a summons to consider them will not be discharged merely because it has not been taken out within the time limited by statute.

A Justice of the Peace has no power to take a recognizance in an election case. *In re North Dufferin*, 7 C. L. T. 212, followed.

A recognizance was taken before R. S., described as a Justice of the Peace. He was also a Commissioner, but nothing appeared upon the recognizance to shew that fact.

*Held*, that the recognizance was invalid.

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### WISHART v. THE CITY OF BRANDON.

*Municipal corporation—Liability for arrest made by police.*

The charter of the defendants provided for the appointment of a police force, the members to be appointed by, and hold office during, the pleasure of a Board of Police Commissioners; the defendants provided the pay of the

men. A member of the force arrested the plaintiff for an alleged breach of a by-law of the defendants.

*Held*, in an action for assault and false imprisonment, that the defendants were not liable.

It is not the absence of control over such a force which relieves a corporation from liability; nor does the having such control render it liable. It is only when the appointment and control of the force rests with the corporation, and the duties they are to discharge are for the peculiar benefit of the corporation, that the latter can be made liable.

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### ACME SILVER CO. v. PERRETT.

*Replevin—Property passing—Sale or consignment.*

The defendant ordered certain goods through the plaintiffs' traveller. The plaintiffs on 12th December wrote the defendant that they would consign only and not sell. This letter was never received, but the defendant did receive a telegram as follows:—"Can only fill order forty off hardware, forty and ten flatware, you paying express. Answer if satisfactory."

The defendant replied, "All right. Send goods at once." On the 16th the goods were shipped. On the same day the plaintiffs wrote the defendant that the goods were consigned only, and not sold; but this letter was not posted until the 18th, and was not received until after the goods had been received and accepted. The invoice was headed "consigned to" the defendant.

*Held*, TAYLOR, J., dissenting, that there was a completed sale to the defendant, and that the property in the goods had vested in him.

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### ROSS v. DOYLE.

*Contract—Sale of chattel or work and labour—Estoppel.*

The plaintiff agreed with the defendant as follows:—"I will put you up building with frame for tent 75x24, according to

plan, for the sum of \$500, starting at once and completing as soon as possible."

After completion the plaintiff tore down the building and carried it away without the defendant's knowledge. In an action for the contract price the jury was told that it was the plaintiff's duty to notify the defendant of the completion and tender it to him.

*Held*, that if the contract was for the sale of a chattel the charge was right; but if for work and labour that it was wrong.

2. That although the circumstances might tend to support the view that the contract was for work and labour, yet that the plaintiff having without the defendant's sanction pulled down and carried away the building, he could not be heard to say that it was not a sale of a chattel, the property in which had not passed to the defendant.

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### ONTARIO BANK v. GILSON.

*Promissory note—Non-endorsement by co-surety.*

The defendant, sued as endorser, pleaded that he became a party to the note merely for the accommodation of A., and upon the condition that B. should also become an endorser as his co-surety, and that B. did not endorse.

*Held*, that the defendant was not liable, even at the suit of an innocent holder for value.

Judgment of TAYLOR, J., 3 Man. L. R. 406, affirmed.

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### TOUSSAINT v. THOMPSON.

The judgment of KILLAM, J., as reported in 3 Man. L. R. 504, was affirmed.

## HARRIS v. RANKIN.

*Registered judgment—Form of certificate—Homestead exemption.*

Homesteads, although prior to patent and subsequent to recommendation exempt from seizure under *fi. fa.*, are subject to be charged by registered judgments.

A certificate of judgment in the form referred to in this case, but having the date correct and its amount such as would shew the judgment to be of record in the Queen's Bench, *held* valid.

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## GALT v. STACEY.

*Examination of judgment debtor—Conduct money.*

A judgment debtor served with an order and appointment under s. 52 of The Administration of Justice Act, 1885, is entitled to be paid conduct money and expenses as in the case of an ordinary witness.

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## HUDSON BAY CO. v. MACDONALD.

*Vendor and purchaser—Rescission—Penalty—Ejectment after default.*

A bill by a vendor alleged that by the contract time for the deferred payments should be of the essence of the agreement, and that upon default the vendor should be at liberty to re-enter upon or re-sell the lands, all payments on account being forfeited; that certain payments on account had been made (not shewing whether before or after the day fixed for the last instalment); that there had been dealings between the parties, and an extension of time given "for payment of some of the instalments"—not saying which of them. The prayer was for a declaration that the contract was at an end and void and that it should be delivered up to be cancelled; and for possession.

A demurrer was allowed upon the grounds :

1. That it was nowhere alleged that the plaintiffs had rescinded the agreement, but on the contrary they seemed

to have continued to deal with, and receive payments from the purchaser.

2. That the right reserved was in the nature of a penalty, and the plaintiffs would not be entitled to rescission without limiting a time for payment.

3. That as to the prayer for possession, the purchaser in possession after default would be a tenant at sufferance and not entitled to a demand of possession, but the bill did not clearly shew that the extension of the time given for payment had elapsed.

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[WALLBRIDGE, C. J.]

### BROWNING v. RYAN.

*Injunction—Trespass by railway company—Puppet plaintiff.*

An Act was passed by the Provincial Legislature providing for the construction of a certain railway by the Railway Commissioner. In pursuance of this Act a contract was entered into with two of the defendants, and the contractors thereupon proceeded to build the road.

This Act was disallowed, as was also an Act extending the operation of the Public Works Act.

The plaintiff, being aware that the route contemplated would cross certain lands, purchased them with a view of obstructing the building of the road. Upon an application for an interim injunction the plaintiff was examined on a view of shewing that he was acting not for himself but as the hand merely of a rival railway company. He admitted to have acted through this company's officials and to have reported progress to them; to have made some arrangement with the company, giving to it certain privileges in respect of the land purchased; but the precise nature of this agreement he refused to divulge; and in a letter he referred to "the party from whom I purchased." Many of the questions although proper and material he refused to answer.

*Held*, 1. That after the disallowance the defendants were without merits or legal right; the Public Works Act (without the disallowed amendment) not giving the right to expropriate lands for the purpose of the railway.

2. That nevertheless the plaintiff was not entitled to an injunction, he being the representative merely of the rival railway, and not acting on his own behalf.

3. That to arrive at this conclusion it was proper to assume as against the plaintiff the answers he could have given if he had answered fairly the questions put to him.

The disallowance of the Acts was signified by proclamation in the *Gazette*, but no reference was therein made to the certificate of the date of the receipt of the acts.

*Semble*, that the certificate need not be signified, but the disallowance only.

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[TAYLOR, J.]

BALFOUR v. DRUMMOND.

*Motion to vary minutes.*

Upon a motion to vary minutes the later rule is that the only question to be argued is, what was the actual order made, except in cases where both parties consent, or where it cannot be ascertained what order was pronounced.

By a judgment an indulgence was granted upon payment of costs, but no order for payment in any event was pronounced. Upon speaking to the minutes this latter order was directed to be inserted.

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[KILLAM, J.]

MULLIGAN v. WHITE.

*Foreign commission—Interrogatories or viva voce.*

*Prima facie* the examination upon a foreign commission is to be upon interrogatories.

And where an order for a commission made no provision for the mode of examination, depositions which had been taken *viva voce* were quashed.

## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

Q. B. D.]

[6TH SEPTEMBER, 1887.

## RYAN v. BANK OF MONTREAL.

*Bill of exchange—Forgery of drawer's name—Estoppel—Forgery of payee's name—Action to recover back amount of forged bill—Laches.*

An appeal from the judgment of the Queen's Bench Division, 12 O. R. 39, was dismissed, the Judges of this Court being divided in opinion.

*Bruce*, Q.C., for the appellants.

*J. MacLennan*, Q.C., and *Haverson*, for the respondent.

CH. D.]

## MERCHANTS' BANK v. MCKAY.

*Mortgage—Security for indebtedness—Sureties—Change of original securities—Forgery—Release of sureties.*

An appeal from the judgment of the Chancery Division, 12 O. R. 498, was dismissed, the Judges of this Court being divided in opinion.

*Rae*, for the appellants.

*D. J. McIntyre*, for the respondents.

C. P. D.]

## McQUAY v. EASTWOOD.

*Malpractice—Medical practitioner—Evidence—Inconsistent findings of jury.*

The judgment of the Common Pleas Division, 12 O. R. 402, affirmed.

*Osler*, Q.C., and *R. McGee*, for the appellants.

*Lount*, Q.C., and *Farewell*, for the respondent.



WILSON, C. J.]

BANK OF HAMILTON v. HARVEY.

*Non-negotiable promissory note—Right to recover—Pleading.*

An appeal from the judgment of WILSON, C. J., 9 O. R. 655, was dismissed, the Judges of this Court being divided in opinion.

*McCarthy*, Q.C., and *Muir*, for the appellant.

*Robinson*, Q.C., and *E. Martin*, Q.C., for the respondents.

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BOYD, C.]

MURPHY v. KINGSTON & PEMBROKE R. W. CO.

*Railway—Expropriation—Deviation—One mile limit—42 V. c. 9.—46 V. c. 64 (D.)*

The judgment of BOYD, C., 11 O. R., 528, affirmed.

*Robinson*, Q.C., and *Cattanach*, for the appellants.

*S. H. Blake*, Q.C., and *Britton*, Q.C., for the respondent.

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PROUDFOOT, J.]

PARTLO v. TODD.

*Trade-mark and Design Act, 1879—Action to restrain infringement of registered trade-mark—Prior user—Definition of trade-mark.*

The judgment of PROUDFOOT, J., 12 O. R. 171, affirmed.  
BURTON, J. A., dissenting.

*W. Cassels*, Q.C., and *J. B. Jackson*, for the appellant.

*Moss*, Q.C., and *G. W. H. Ball*, for the respondent.

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[25TH OCTOBER, 1887.]

LONDON MUTUAL FIRE INSURANCE COMPANY  
OF CANADA v. CORPORATION OF THE CITY  
OF LONDON.

*Assessment—Income—Mutual Insurance Company—Appeal to County Judge—Finality.*

The judgment of PROUDFOOT, J., 11 O. R. 592, affirmed.

*Moss*, Q. C., and *E. R. Cameron*, for the appellants.

*W. R. Meredith*, Q. C., for the respondents.

FERGUSON, J.]

[6th September, 1887.]

## WALLBRIDGE v. GAUJOT.

*Landlord and tenant—Lease of mines—Exhaustion of ore—Surrender of term—Determination of lease.*

The plaintiff, by deed of 30th December, 1882, created a term for ten years, which became vested in the defendants, of "all the mines of ores of iron and iron stone, as well opened as not opened, which can, shall, or may be wrought, dug, found out, or discovered within, upon, or under ten acres square of the north half of lot number 12 in the 6th concession of Madoc"; Yielding and paying \$1 per gross ton of the said iron stone or ore for every ton mined and raised from the land and mine, payable quarterly on the first days of March, June, September, and December in each year. The lessees covenanted to dig up, etc., not less than 2,000 tons the first year and not less than 5,000 tons in every subsequent year, and "pay quarterly \$1 per ton for the quantity agreed to be taken during each year : " \* \* And if the same should exceed the quantity actually taken, such excess to be applied towards payment of the first quarter thereafter in which more than the stipulated quantity should be taken : "Provided that if the iron ore or iron stone shall be exhausted and not to be found or obtained there, by proper and reasonable effort, in paying quantities, then the parties of the second part shall be at liberty to determine this lease."

The defendants entered and proceeded to work the mines until September (or December), 1884, when, having taken but about 300 tons, they ascertained that the ore could not be obtained in paying quantities, whereupon they notified the lessor thereof and of their desire to surrender their lease, which surrender the lessor refused to accept, and instituted proceedings to recover the amount of two quarters' rent (all prior rents having been regularly paid). The defendants counter-claimed for the rents already paid by reason of failure of consideration.

*Held*, (1) that, in the absence of any specified mode of surrendering the term having been provided for by the lease, the act of the defendants was a sufficient determination thereof; (2) [in this reversing the judgment of Ferguson, J.]

that the consideration for the lease had not failed, so as to bring it within the class of cases where the subject matter could be treated as non-existent, and by the true construction of the lease the plaintiff was entitled to be paid quarterly for the quantity of ore agreed to be got out; that the defendants were not entitled to recover back any of the rents paid, and that the lessor was entitled to judgment for such rent as accrued due between the 1st of June and the giving of the notice of surrender.

*Robinson, Q.C., and Dickson, Q.C., for the appellant.*

*John Bell, Q.C., W. Cassels, Q.C., and Burdett, for the respondents.*

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[25TH OCTOBER, 1887.]

### KENNEDY v. CORPORATION OF CITY OF TORONTO.

*Crown lands—Patent subject to condition—Trust—Crown's Rights—Private Act—Provincial legislature—Intra vires—Ordinance lands—"Sell, lease, or otherwise dispose of"—Interpretation.*

The judgment of FERGUSON, J., 12 O. R. 211, affirmed.

*McCarthy, Q.C., and J. H. Macdonald, Q.C., for the appellants.*

*Robinson, Q.C., and McWilliams, for the respondents.*

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O'CONNOR, J.]

[10th NOVEMBER, 1887]

### BULL v. NORTH BRITISH CANADIAN INVESTMENT CO.

*Appeal, right of—Court of Appeal—Order of Judge in court—Interlocutory order.*

An order was made by a Judge of the High Court of Justice, sitting in Court, to compel the execution by the defendants, mortgagees, of a reconveyance or discharge, directed by a previous judgment, or in default for a sequestration.

*Held*, that an appeal to the Court of Appeal lay without leave, whether the order was to be regarded as interlocutory or not.

*Semble*, per HAGARTY, C. J. O., and PATTERSON, J. A., that such an order is not in its nature interlocutory.

*C. Millar*, for the plaintiff.

*J. Macleennan*, Q. C., and *D. Urquhart*, for the defendants.

C. C. LEEDS AND GRENVILLE.] [29TH SEPTEMBER, 1887.

# RAYMOND v. SCHOOL TRUSTEES OF THE VILLAGE OF CARDINAL.

*Public schools—Trustees—Right to dismiss teacher—49 V. c. 49, ss. 165-168.*

The right of public school trustees to dismiss a teacher hired by them necessarily arises from the relation of the parties. 49 V. c. 49, ss. 165-168, provides a proceeding by which the status or qualification of the teacher may be determined; and the result of such proceeding may be in effect the same as a dismissal; but this enactment does not take away the inherent right of the employers to dismiss.

*Knapp*, for the appellant.

*Shepley*, for the respondents.

C. C. WENTWORTH.]

## ROOS v. HAENEL.

*Interpleader—Bona fides of claim—Interference with verdict.*

Goods seized under an execution were claimed by the father-in-law of the execution debtor under a chattel mortgage, and an issue was directed to be tried between the claimant and the execution creditors. At the trial no witnesses were examined except the claimant and the execution debtor, and although they swore to the *bona fides* of the claim, the verdict and judgment were for the execution creditors.

*Held*, that the Court could not interfere.

*F. Fitzgerald*, for the appellant.

*H. S. Osler*, for the respondents.

C. C. OXFORD.]

## MURRAY v. HUTCHINSON.

*Sale of goods—Breach of contract by vendor—Recovery of deposit—Findings of jury.*

The statement of claim alleged that the plaintiff purchased from the defendant some cattle on the terms that the defendant should keep them on his premises until they should be in a condition fit to export; that the plaintiff paid the defendant \$200 on account of the purchase; that the plaintiff afterwards demanded a delivery of the cattle, which the defendant wholly refused; and in breach of his contract sold and delivered the cattle to another person; and the plaintiff claimed to recover back the \$200 deposit, which he had demanded before action, but which had been refused. The defendant's version of the bargain was that the plaintiff was to pay the balance of the price and remove the cattle from the defendant's premises by a date certain, but that he failed to do so, and the defendant was obliged after the date certain had passed to sell the cattle at a much lower price; and he counter-claimed for damages in excess of the \$200 in his hands.

The jury found a verdict for the plaintiff for the \$200 upon conflicting testimony.

*Held*, upon the evidence, that there was no ground for interfering with the findings of the jury; and that the plaintiff could waive the breach of contract, and assenting to the improper disposition of the cattle, merely require the defendant to repay to him the money paid on account.

*C. J. Holman*, for the appellant.

*Aylesworth*, for the respondent.

C. C. GREY.]

## MITCHELL v. VANDUSEN.

*Costs—Successful party mulcted in costs—Rule 428.*

An action by the bailiff of one Division Court against the bailiff of another Division Court, to recover the proceeds of goods seized and sold by the latter under an execution

against B., which at the time of such seizure and sale were under seizure and had been advertised for sale by the plaintiff under executions which he also held against B. The action was tried without a jury by the Judge of a County Court, who held that the plaintiff was entitled to recover, but deprived him of his costs, and ordered that the defendant's costs of the action, and the costs of the seizure and sale of the goods should be deducted from the amount of the judgment.

The plaintiff having, by leave of the Judge, appealed from the discretion exercised in the disposition of the costs, this Court reversed the decision and ordered the defendant to pay the plaintiff's costs.

HAGARTY, C. J. O., reserved his opinion as to the existence of any right in any Judge to make a defendant pay the costs of a plaintiff who has failed to establish a right to recover, or to make a plaintiff who has substantially proved his right to recover, pay the costs of the defendant.

*Per* PATTERSON, J. A.—Rule 428 gives full discretion over the apportionment of costs, and in proper cases to deprive the successful party of costs, but does not extend to make any party, whether plaintiff or defendant, who is wholly successful in his action or defence, pay the costs of his defeated opponent.

*Per* OSLER, J. A.—The jurisdiction in question is one which does exist, though the circumstances in which it has been exercised are of a very special and unusual character.

*Creasor*, Q.C., for the appellant.

*George Kerr*, for the respondents.

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C. C. YORK]

[26TH OCTOBER, 1887.

COYNE v. LEE.

*Chattel mortgage—After-acquired property—Interpleader issue—County Court—Appeal.*

A chattel mortgage conveyed to the plaintiff the stock in trade of the mortgagor as a general hardware merchant, etc., more particularly described in schedule A. ; all which goods and chattels were situate and lying on certain specified premises. Schedule A. set out the property and proceeded :

“And all goods . . . which at any time may be owned by the said mortgagor and kept in the said store for sale by him as a general hardware merchant . . . and whether now in stock or hereafter to be purchased and placed in stock.”

*Held*, affirming the judgment of the Court below, that the after-acquired property brought into the business in ordinary course was covered by the plaintiff's chattel mortgage, as against the executions of creditors of the mortgagor. No title to such property passed at law; the claim rested on the mortgagee's equitable title; as soon as the property was brought upon the named premises and into the named business, it was identified, and the equity attached.

The action out of which this interpleader issue arose was in the High Court of Justice; the interpleader issue and subsequent proceedings were transferred to the County Court of Middlesex by an order under 44 V. c. 7, s. 1. A subsequent order recited that the parties had consented that the issue directed should be determined by the decision of the County Court of York on a special case agreed upon, and directed that the venue should be changed from Middlesex to York, and that the parties should proceed to the argument of the special case before the County Court of the latter county.

*Held, per* PATTERSON and OSLER, JJ.A., that no appeal lay to this Court from the decision of the County Court of York upon the special case, and that the appeal should be quashed.

*McMichael*, Q.C., for the appellants.

*J. M. Clark*, for the respondent.

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## High Court of Justice.

### CHANCERY DIVISION.

[BOYD, C., 6TH NOVEMBER, 1887.]

### HERCHMER v. ELLIOT.

*Mistake—Fraud—Purchaser for value—Solicitor and client.*

P. gave a mortgage on lands to J. H. Subsequently an assignment of this mortgage to K. E., purporting to be

executed by P., was handed to K. E. by P.'s solicitor, who was also the solicitor of K. E. J. H. brought this action to have this assignment delivered up to be cancelled as a cloud on her title and void.

The evidence shewed that J. H. when she executed it was told and believed that it was merely to provide for an extension of the term of payment of the mortgage from P.

*Held*, that J. H.'s signature having been obtained by a piece of deception which involved a fundamental error on her part, the assignment of the mortgage was void, even in the hands of an innocent holder.

*Held*, further, that the assignment being void, and no estate having therefore passed thereunder, there was no basis in which K. E. could found the defence which he set up, of purchaser for value.

*Held*, however, apart from this, that the circumstances under which K. E. obtained this assignment, viz., from the said solicitor to secure some moneys due from the said solicitor to K. E., were such that K. E. had no reason to trust to any statement in the assignment that J. H. had been paid the mortgage moneys, and he was not constituted a purchaser of the assignment for value as against J. H.

The possession of the assignment of the mortgage, apparently executed by J. H., did not authorize the solicitor to pledge it for a debt of his own, or justify the defendant K. E. in accepting it without the privity of the plaintiff.

*Dickson*, Q.C., for the plaintiff.

*W. Cassels*, Q.C., and *G. A. Skinner*, for the defendants.

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[PROUDFOOT, J., 26TH OCTOBER, 1887.]

## STRUTHERS v. GLENNIE.

*Voluntary conveyance—Subsequent creditor—Indebtedness of grantor.*

Action by a subsequent creditor to set aside a voluntary deed executed about five years before the debt to the creditor was incurred. It appeared that the deed was not impeachable on the ground of any fraud or fraudulent intent on the part of the debtor or grantee, but that there was a debt



due at the date of the deed which had not been paid. It, however, also appeared that this debt had become barred under the statutes of limitation.

*Held*, that the plaintiff could not succeed.

The only reason that a subsequent creditor is allowed to maintain such an action merely on the ground of the settlor's indebtedness is that if a prior creditor set aside the settlement a subsequent creditor would be entitled to participate *pro rata*, so that he has an equity to participate and may bring his action to enforce that equity. And if the antecedent creditor cannot impeach such settlement, neither can a subsequent creditor impeach it, merely on account of a settlor's indebtedness to him.

*W. R. Meredith*, Q.C., for the plaintiff.

*S. H. Blake*, Q.C., and *Gibbons*, for the defendants.

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[9th NOVEMBER, 1887.]

DICKSON v. MONTEITH.

*Mandamus—Surrogate Judge—Grant of administration—Jurisdiction—R. S. O. c. 46, s. 31.*

Mandamus directed to issue to compel the Judge of the Surrogate Court of the County of Wellington to grant administration with the will annexed of a certain testator to G. D., one of the next of kin, who had filed all necessary papers, notwithstanding that on an issue directed out of the said Surrogate Court a jury had found against the will. It appeared that the present applicant was no party to that issue, and that since the trial of it this Court had held in favour of the will.

*Held*, also, that this was not a case for an appeal from the refusal to grant administration under the Surrogate Court Act, because an appeal under that section would appear to be granted only when some one contests the grant of administration, which no one was doing here.

*Semble*, that this Court has jurisdiction to declare a will valid.

*Moss*, Q.C., and *Hoyles*, for the motion.

*J. MacLennan*, Q. C., contra.

[FERGUSON, J., 29th SEPTEMBER, 1887.]

MAYS v. CARROLL.

*Will, construction of—Devise—Next of kin—Period of distribution—Executors.*

J. C. died leaving a wife and a daughter, E. C. By his will, after giving all his property to his executors to pay the whole income to his wife for life, or during widowhood, and after her death or second marriage to pay the said income to his daughter, E. C., yearly, if she had attained the age of 21, for her life, he provided as follows: "And I hereby empower her my said daughter, if she come into possession of the said income, and have lawful issue, to make a will bequeathing my said property absolutely to any or all of her said children, in such manner as she may think best. And if she have no children, then the said property to fall to my next of kin who may be living on this continent;" and further provided: "In case . . . then, notwithstanding anything heretofore provided, I will and direct that neither she (E. C.), nor any of her children shall receive any portion of my property, and in such case my whole property shall be given to my said wife absolutely, or if my said wife at that time be dead, then the property to go to my nearest of kin as above provided." The wife died, and the daughter E. C. attained 21, came into possession of the income, and died unmarried, and without issue, having made a will appointing the plaintiff her executor. In an action by the plaintiff, as executor of the daughter E. C., against W. C. and F. McQ., as executors of the testator J. C., for the property, which the defendants resisted on the ground that the next of kin of the testator other than E. C. were entitled to it;

*Held*, that the "next of kin" must be ascertained at the death of the testator J. C., and not at the death of his daughter E. C., and as E. C. was sole next of kin, she had such an interest as would pass by her will, and the plaintiff as her executor was entitled to the property.

*G. W. Field*, for the plaintiff.

*J. L. Murphy*, for the defendants.

[1ST OCTOBER, 1887.]

*In re* STEVENS—STEVENS v. STEVENS.*Will—Legacies—Time for vesting.*

S. by his will devised four legacies to his daughters in four different clauses, worded as follows:—"I bequeath to my daughter (name) the sum of five hundred dollars." By a subsequent clause he provided: "I also order that should any of my daughters die, their portion to be equally divided among the remaining ones." The legacies were charged on his lands. Directions were also given that after a certain farm which he had purchased in his lifetime, but had not paid for, was paid for, and all his debts paid, his two sons E. and A. "shall each pay my daughter M. A. S. the sum of \$50, which she shall receive, together with the rent of lot 126 (from the executors) to apply on her legacy. The other three daughters to be paid in the same manner, E. in one year after M. A.," etc. A direction was also given that in case of any of the daughters dying their funeral expenses were to be paid out of their legacies, and in case of sickness their physician's bill to be paid from the same source.

*Held*, on an appeal from a Master, that these provisions, and all others of a like kind in the will had reference at most to the mode and time of *payment* of the legacies and not to the substance of the gift, and that as the testator had not clearly and with certainty expressed the intention that the legacies should not vest until the times of payment, the legacies were given in the ordinary way to vest upon the death of the testator.

*Moss*, Q.C., and *Hoyles*, for the appellants.

*J. Maclellan*, Q.C., for the infant.

*W. Cassels*, Q. C., for the respondents.

[11TH NOVEMBER, 1887.]

## CORBY v. GRAY.

*Vendor and purchaser—Sale subject to mortgage—Liability to indemnify—  
Parol evidence.*

Although where one sells land subject to an outstanding mortgage, there arises a presumption or supposed intention, in equity, on the part of the purchaser, to indemnify the vendor against the mortgage, (if, that is, under the actual facts and circumstances, the parties are to be considered to have really occupied the relation of vendor and purchaser,) yet this presumption may be rebutted by parol evidence; and it was held to have been so rebutted in this case, in which it appeared to be contrary to the real intention of the parties to the transaction in question, who, moreover were not strictly in the relation of vendor and purchaser.

*Parkes*, for the plaintiff.

*McCarthy*, Q.C., for the defendant Gray.

*Stanton*, for the defendant Grimrod.

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STEWART v. GROUGH.

*Attachment of debts—Share under will—Receiver—Rule 376—Interpleader.*

A testator left his real and personal property to the defendants, as executors and trustees, on trust to sell and divide among his eight children, of whom S. S. was one. The testator died in May, 1883. On 30th August, 1883, J., one of the defendants, obtained judgment against S. S., and on 15th September, 1883, an attaching order was made thereon attaching all debts due and accruing due from the defendants to S. S. referring to his share under the said will. Afterwards on 3rd October, 1883, J. S. recovered judgment against S. S., and on 27th October, 1883, J. W. S. was by an order, made without notice to the defendants, appointed receiver, and after his death the plaintiff was appointed receiver in his place. Notice of the making of these orders was given to the defendants, after they were made.

In 1886 the defendants as executors as aforesaid sold the testator's estate and realized the share of S. S., and paid it over to J., under the attaching order, and afterwards distributed the rest of the estate. The plaintiff now sued the defendants claiming payment of the amount of S. S.'s share to him.

*Held*, that the attaching order was properly made and the defendants were bound by it, and the payment made by them under it discharged them under rule 376, and the action must be dismissed with costs.

*Leeming v. Woon*, 7 A. R. 42, followed in preference to *Webb v. Stanton*, 11 Q. B. D. 518.

*Held*, also, that the fact of J., the attaching creditor, being one of the executors and trustees in whose hands the share of S. S. was attached, did not invalidate the garnishee proceedings.

*Held*, lastly, that the defendants were not bound to interplead on receiving notice of the appointment of the receiver.

*MacKelcan*, Q.C., and *Corby*, for the plaintiff.

*Moss*, Q.C., and *E. P. Clement*, for the defendants.

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## IN CHAMBERS.

[BOYD, C., 19TH NOVEMBER, 1887.]

### *In re* MONTEITH, MERCHANTS' BANK v. MONTEITH.

*Costs*—Solicitor appointed by Master—Charging parties represented with costs—G. O. Chy. 218.

During a reference in an administration suit the Master appointed the solicitor for one of the unsecured creditors of the estate in question to represent the general body of unsecured creditors. The Imperial Bank were unsecured creditors of the estate; they sent in a claim to the administrator in answer to the statutory advertisement for creditors, but did

not prove their claim before the Master. The nomination of the one solicitor for the unsecured creditors was an *ex parte* proceeding, of which the Bank were not notified till a year afterwards.

*Held*, that, in the absence of contract, or of an order of the Master made under conditions contemplated by G. O. Chy. 218, the solicitor could not recover from the Imperial Bank any portion of the costs incurred on behalf of the unsecured creditors in contesting the claims of the secured creditors. The doctrine of ratification by silence or inaction does not apply to a case like this.

*Hall v. Lane*, 1 Ha. 571, followed.

*Hoyles*, for the solicitor.

*Kappele*, for the Imperial Bank.

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[GALT, J., 5TH NOVEMBER, 1887.]

### HILLYARD v. ROYAL INSURANCE CO.

*Arbitration—Costs—Taxation—Time and expenses in travelling—Amount of fees.*

Upon an appeal from the taxation of costs of an arbitration, which the plaintiffs were ordered to pay ;

*Held*, that items in respect of the loss of time in travelling and travelling expenses of an arbitrator were properly disallowed.

*Held*, also, that the amount to be allowed *per diem* to arbitrators and counsel was a matter peculiarly within the province of the taxing officer, and his decision should not be interfered with.

*A. H. Marsh and Hilton*, for the defendants.

*Kappele*, for the plaintiffs.

[PROUDFOOT, J., 9TH NOVEMBER, 1887.]

*In Re* McRAE AND THE ONTARIO AND QUEBEC  
RAILWAY CO.

*Arbitration—Railway—Costs—Taxation—R. S. C. c. 109, s. 8, s-s. 22, 23—  
Appeal—Witnesses—Subpœnas.*

By the Dominion Railway Act, R. S. C. c. 109, s. 8, s-s. 22, the costs of an arbitration as to the value of land expropriated for a railway may be taxed by the Judge. The Judge in this case by an order not appealed against referred the taxation to a taxing officer.

*Held*, that the question whether the Judge had power to delegate the taxation could not be raised, and that an appeal lay from the taxing officer to the Judge.

By s-s. 23 of s. 8 of the Act, "the arbitrators . . . may examine on oath . . . the parties, or such witnesses as may voluntarily appear before them." In this case subpœnas were issued and witnesses attended upon them and were examined.

*Held*, that there was no power to compel the attendance of witnesses, and those who attended must have done so voluntarily; there was no power therefore to tax the subpœnas as such, but as they operated as notices, the proper costs of notices should be allowed, and also the costs of the attendance of the witnesses.

*Aylesworth*, for the land-owner.

*J. M. Clark*, for the Railway Company.

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[ROSE, J., 15TH NOVEMBER, 1887.]

SUTHERLAND v. PHIPPEN.

*Witness—Allowance—Solicitor—Cross-examination on affidavit.*

Motion by the defendants to commit Mr. Masson, a practicing barrister and solicitor, for his refusal to be sworn upon

his attendance before an examiner pursuant to subpoena and appointment, for cross-examination upon his affidavit made for use upon an interlocutory application in this action. The affidavit related to matters of which he acquired a knowledge when acting as solicitor for one of the parties to this action. Mr. Masson was paid only \$1, and refused to be sworn unless he received an allowance of \$4, according to the tariff under G. O. Chy. 615, 1 *Holmsted* R. and O., p. 411: "Barristers and attorneys, physicians and surgeons, when called upon to give evidence, in consequence of any professional service rendered by them, or give professional opinions, *per diem*, \$4."

G. A. Skinner, for the motion, contended that the tariff did not apply to a cross-examination where a witness had made an affidavit, and thus brought himself before the Court.

A. Hoskin, Q.C., contra, cited *Drewry's* Chancery Practice, 242; *Clarke v. Gill*, 1 K. & J. 19; *Davey v. Durrant*, 24 Beav. 493.

ROSE, J., followed *Clarke v. Gill*, and held that a witness was entitled to the same allowance when subpoenaed to attend for cross-examination on an affidavit, as he would be if required to give evidence at a trial. The affidavit made by Mr. Masson shewed that he was called upon to give evidence in consequence of professional services, and he was therefore entitled to \$4.

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[THE MASTER IN CHAMBERS, 22ND NOVEMBER, 1887.]

## HANDS v. UPPER CANADA FURNITURE CO.

*Examination—Exclusion from Examiner's chambers—Exhibits.*

Upon an examination before a Special Examiner at his chambers:—(1) The examining counsel has no right to have a clerk present to assist him, if the opposite party objects.

(2) If documents are produced by the party under examination, the opposite party is entitled to have them marked as exhibits.



(3) It is within the discretion of the Examiner to exclude from his chambers even the solicitor for the examinant, if his presence interferes, in the Examiner's opinion, with the due execution of his duty as Examiner.

*Hands*, for the plaintiff.

*Echlin*, for the defendants, Wm. Beatty & Son.

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## NOVA SCOTIA.

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In the Supreme Court.

POTTERS v. TAYLOR.

*Bill of exchange—Conditional acceptance—Failure to prove fulfilment of condition.*

The defendant, as assignee of the estate of C. F. & Co., accepted a bill "payable when in funds as a first preference out of the estate."

*Held*, that, in the absence of proof that the defendant was in funds in the amount sought to be recovered, before action brought, the plaintiff could not succeed.

*Per* McDONALD, C. J., dissenting, that there was evidence of the receipt of a considerable sum of money by the defendant out of the assets of the estate, and that, in the absence of a fuller account of expenditures than had been given, the defendant was concluded from denying that he was in funds at the time he accepted the bill.

## SEDGEWICK v. FAIRBANKS.

*Solicitor and client—Action for costs—Special agreement—Delivery of bill not necessary—Pleading.*

In an action brought to recover an amount claimed to be due to the plaintiffs for professional services as solicitors for the defendant, the jury found that the defendant did not contract with the plaintiffs by retaining them to execute professional business for him as alleged. It appeared clearly from the evidence that in two cases the plaintiffs had been so retained, and in a third case the retainer was admitted, but the defendant swore that at the time his affairs were in the hands of C., his assignee, and that he said to S., one of the plaintiffs, "I am not acting personally, nor am I going to pay any money personally, but it must come by and through the assignee and inspector, and out of the funds in their hands." And further, "I told him distinctly that no personal obligation was to attach to me."

*Held*, that the denial of the retainer was not sustained by proof of the special agreement alleged, even supposing it to have been proved.

*Held, also*, that the special agreement should have been pleaded, and threw the burden on the defendant of proving affirmatively not only the source from which the funds to pay the plaintiffs were to come, but also that such funds had not come into the defendant's hands.

RITCHIE, J., dissented.

Under the practice in this province the delivery of a bill of costs, as required by 3 James I, c. 7, is not necessary, costs being recoverable as any other debt.

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O'BRIEN v. THE CITY OF HALIFAX.

*Municipal corporation—Negligence—Notice of action—Service on mayor—Non-suit—Findings of jury.*

The Halifax City charter, Acts of 1864, c. 81, s. 276, provides that "no action shall be commenced against the city till 20 days' notice in writing shall be given" etc. The plain-

tiff proved a notice addressed to and served upon the Mayor of the City "that, after the expiration of 20 days from the service upon you of this notice, an action at law will be commenced in the Supreme Court against the City of Halifax at the suit of Mrs. B. O'B. to recover damages for injuries sustained by her in falling over an unprotected embankment on Campbell Road, owned by the city."

*Held*, that the notice was sufficient in all respects.

*Held, also*, that, in the absence of any special provision in the City charter for service of process upon the City, the service upon the Mayor was sufficient.

*Held, also*, that a motion to non-suit the plaintiff on the authority of *Wright v. The Midland Railway Co.*, 51 L. T. N. S. 539, was properly refused.

*Held, also*, that the negligence of the defendant having been clearly established, and the question of contributory negligence having been left to the jury, who found in favour of the plaintiff, the judge presiding was obliged to enter judgment in accordance with the findings, and the judgment so entered should not be disturbed.

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### MOONEY v. McINTOSH.

*Trespass—Possession essential to maintenance of action—Claim of title—Adverse possession—Conventional line—Ratification.*

The plaintiff brought trespass seeking to recover damages for acts alleged to have been committed by the defendant on land of the plaintiff. It appeared that the plaintiff had never had either actual or constructive possession of the land in question, but that it had been in the possession of the defendant under a claim of title for a period of fifteen or sixteen years.

*Held*, that the plaintiff could not recover.

WEATHERBE, J., dissented on the ground that the plaintiff had proved a documentary title, and that nothing short of the statutory adverse continuous possession for twenty years could defeat his title.

The defendant, as part of his defence, relied upon a conventional line alleged to have been established with L., a former proprietor. It appeared that L. had no title at the time, but that after obtaining title, she ratified and adopted the line.

*Held*, per WEATHERBE, J., that the alleged line was insufficient (a) because it did not appear that the real boundary was incapable of being ascertained; (b) because L. had no interest at the time it was established; (c) because it was not alleged that the ratification took place on the ground, or that any particular line was mentioned; (d) because L. was illiterate and was unaware of the specific nature of the description of her boundary; (e) because the alleged agreement appeared to have been a compromise, whereby one piece of land was exchanged for an equivalent piece at another part of the lot.

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*In re G. W. STUART.*

*Mortgage—Foreclosure—Writ of possession—Question of title—Chambers—Summary decision—Laches.*

J. A. W. applied at Chambers for and obtained an order for a writ of possession of lands and premises purchased by him at a foreclosure sale. An appeal from the order was taken on behalf of M. J. B., widow of F. T. B., the mortgagor, on the grounds that the lands in question were the property of the crown, and were held by her under lease from the crown, and that a question of title having been raised, such question could not be decided in a summary way, but that possession must be sought by action at law.

*Held*, that the sheriff could only put J. A. W. in possession of the land actually described in his deed, and that M. J. B. having shown that the land she occupied and claimed under lease from the Crown was outside of that description, she had no ground for opposing the issue of the writ.

*Held, also*, that M. J. B. having been made a party to the suit, and having failed to appear, could not, without opening up the decree of foreclosure, which barred her estate and interest, oppose the issue of a writ of possession by setting

up a claim which existed and which could have been raised as a defence, if the description in the mortgage covered the land held by her under lease from the Crown.

WEATHERBE, J., dissented on the ground that a question of title had been raised which could not be decided in a summary way at Chambers.

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### SYMONDS v. FISHWICK.

*Action for work and labour—Counter-claim—Rectification of contract—Amendment of pleadings—Laches.*

To an action to recover an amount claimed to be due for work and labour done, the defendant sought to plead, by way of set-off or counter-claim, an amount which the plaintiff had agreed to pay for every day that his contract should remain unexecuted after the date fixed for its completion. The words "per day" having been omitted from the contract, the defendant applied to the Equity side of the Court for a rectification, and obtained an order staying proceedings in the meantime.

An order rectifying the contract by adding the words omitted was granted on the 27th May, 1885, but no step was taken by the defendant to amend her pleadings until October following, when an application was made at Chambers for leave to amend by filing the counter-claim. The defendant's counsel accounted for the delay by alleging on affidavit, that he could not have counter-claimed prior to the rectification of the contract, and that subsequently he was delayed by the absence of witnesses from whom it was necessary to obtain certain information. The application for leave to amend having been refused ;

*Held*, on appeal, that although the delay after the making of the order had not been satisfactorily accounted for, the refusal to permit the amendment on terms was not justified by the circumstances of the case.

Per McDONALD, C.J., dissenting, that the defendant was guilty of undue and unexplained delay, and was not entitled to the amendment applied for by reason thereof.

The power to amend is so plainly intended to allow all mistakes and errors made in pleading to be rectified in the absence of *mala fides*, and under such conditions as to prevent injury to the opposing party, that the Court will hesitate, except under very exceptional circumstances, to refuse an amendment to either party where such injury would not occur or where, if occurring, it could be compensated for.

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## ONTARIO.

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### Supreme Court of Judicature.

#### COURT OF APPEAL.

Q. B. D.]

[25TH OCTOBER, 1887.

#### PURDOM v. NICHOL.

*Principal and surety—Promissory note—Novation—Partnership—Discharge—Subrogation.*

P. indorsed a note at four years for the accommodation of N., which N. handed to R. as collateral security for a debt secured to R. by two mortgages on N.'s freehold, the second being in form an absolute conveyance. After this B. entered into partnership with N., and R. agreed to throw off \$1,000 of N.'s indebtedness, which was then \$7,323.08, if B. became jointly liable with N. for it. To effect this R. conveyed the freehold to B. and N. for the expressed consideration of \$6,323.08, and B. and N. gave a mortgage to R. at two years for the same amount. The note was not taken into account in this transaction, and B. knew nothing of it. In less than a year after, B. and N. dissolved partnership, and, as between themselves, B. assumed the liability to R.

When B. came to settle with R., P. had paid the amount of his note, and R. gave credit to B. for the amount so paid. When P. paid the note he had no knowledge of B.'s connection with the matter.

P. claimed from B. the amount of the note, on the ground that he paid it as surety for the debt for which B. was liable, and that B. received the benefit of the payment by the credit given for it on the mortgage debt.

*Held*, that P. paid his money to the use of N., not of B. : P.'s highest right was to be subrogated to the rights of N. as against B.

*Semble*, that the effect of the transaction between R. and B. and N. was to discharge P.

*Idington*, Q.C., for the appellant.

*Moss*, Q.C., for the respondent.

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## High Court of Justice.

### QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 28TH NOVEMBER, 1887.]

#### GOWANS v. BARNET.

*Discovery—Examination—49 V. c. 16, s. 12—Solicitor—"Employee"—  
"Transfer."*

The solicitor of a judgment debtor who had absconded transferred property of the judgment debtor to a purchaser, under power of attorney, and received the consideration money, \$4,000. Upon an application to examine the solicitor, under 49 V. c. 16, s. 12,

*Held*, that this provision being remedial and for the purpose of enabling the judgment creditor the better to discover property of his debtor, it should be construed so as to advance the remedy, so far as the fair meaning of the words will permit. The word "transfer" in the expression "any person to whom the debtor has made a transfer of his pro-

perty or effects," should not be limited to the transfer of the *title* to the property or effects, but should be regarded as equally applicable to the transfer of the *possession*; and therefore the solicitor was a person to whom a transfer of the debtor's property and effects to the extent of \$4,000 had been made, for the possession of that sum had been transferred to him by the debtor.

*Per* ARMOUR, C.J., the solicitor was also an employee of the judgment debtor within the meaning of the section.

*Walter Macdonald*, for the plaintiff.

*J. R. Roaf*, for the defendant.

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## CHANCERY DIVISION.

[THE DIVISIONAL COURT, 1ST DECEMBER, 1887.]

### FARRAN v. HUNTER.

*Jury notice—Action to enforce lien on land—Severing issues.*

An action for part of the price of a machine and to enforce a lien on land for such price, with a defence of breach of warranty in the defective condition of the machine, is not distinguishable from an ordinary mortgage action to which a defence is raised. Such an action would have been in the exclusive jurisdiction of the Court of Chancery before the Judicature Act, and a jury notice is therefore improper under s. 45. A separate trial by jury upon the issue raised as to the character of the machine should not be ordered in a case of this kind, where there is but one cause of action.

*Temperance Colonization Society v. Evans*, 12 P. R. 48; *McMahon v. Lavery*, 12 P. R. 62, distinguished.

*Watson*, for the defendant.

*T. Langton*, for the plaintiff.



[2ND DECEMBER, 1887.]

*In re* McRAE AND THE ONTARIO AND QUEBEC  
R. W. CO.*Costs—Taxation—Appeal—Arbitration—Witnesses—Subpœna—R. S. C. c.*  
*109, s. 8, s-s. 22, 23.*

The decision of PROUDFOOT, J., 12 P. R. 282; 7 C. L. T. 432, affirmed.

*J. M. Clark*, for the Company.

*Aylesworth*, for the land-owner.

[7TH DECEMBER, 1887.]

*In re* McQUILLAN AND THE GUELPH JUNCTION  
R. W. CO.*Arbitrator—Disqualification—R. S. C. c. 109, s. 8, s-s. 28—“ The judge ”*  
*—Divisional Court—Appeal—Certiorari.*

A motion was made to GALT, J., under R. S. C. c. 109, s. 8, s-s. 28, to determine the validity of the cause of disqualification urged by land-owners against the arbitrator appointed by a railway company under the provisions of the Act. The objection was that the arbitrator was a ratepayer of a city largely interested in the railway company as a shareholder and creditor. He was not himself a shareholder, nor had he any personal interest in the matter, except as a resident of the city, in which he had no real estate, and was assessed on income only.

*Held*, by GALT, J., that the arbitrator was not disqualified.

*Held*, by the Chancery Divisional Court, that no appeal lay to a Divisional Court from the decision of the Judge acting under the statute.

*Held*, also, that the Divisional Court had no power to remove the proceedings by *certiorari*.

*J. L. Murphy*, for the land-owners.

*Aylesworth*, for the Company.

## COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 26TH NOVEMBER, 1887.]

## EGAN v. MILLER.

*Libel—Costs, security for—50 V. c. 9, s. 4.*

APPEAL by the defendant from an order of Armour, J., at Chambers, reversing an order of the Master in Chambers, which required the plaintiff to give security for costs of an action for libel.

The defendant was not the editor, or proprietor, or publisher, but a correspondent of a newspaper, and the libel charged was in respect of a letter signed by the defendant, published in the newspaper, with which the defendant had no connection.

*Kean*, for the defendant, relied upon the literal words of "An Act respecting the Law of Libel," 50 V. c. 9, s. 4—"In any action brought for libel contained in any public newspaper or periodical, the defendant may, at any time after the filing of the statement of claim, apply to the Court or Judge for security for costs," etc.

*Aylesworth*, for the plaintiff, was not called upon.

THE COURT held that other expressions in the Act clearly shewed that the provision as to security for costs applied only to the publisher, editor, or proprietor of a newspaper. The very section in question required the defendant to swear that "the statements complained of were *published* in good faith." Appeal dismissed with costs.

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NEW BRUNSWICK.

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## In the Supreme Court.

## QUIDDY RIVER BOOM CO. v. DAVIDSON.

*Crown grant—Bed of tidal river—Riparian owner—Public right of navigation—Injury to piers in the tide-way—Injunction to protect rights of riparian owner—Assessment of damages by consent, right to appeal from.*

A grant by the Crown of a tract of land fronting on the shore of the Bay of Fundy described it as commencing on

the Bay shore and running a certain course and distance inland, thence along the exterior lines of the tract till it again met the Bay shore at a different point, and thence following the Bay shore to the place of beginning, conveys to the grantee the bed of a tidal river, which runs through the land, and discharges into the Bay between the starting point of the grant and the place where the line again strikes the Bay shore.

The Provincial Act, 45 V. c. 100, passed since the British North America Act came into force, is *ultra vires*, so far as it professes to authorize the erection of piers and booms in a tidal river.

Piers erected in the river, under the supposed authority of the Act, become the property of the owner of the bed of the river; but may be used by persons navigating the river, for the purpose of protecting and securing lumber floating down the river, and to prevent its loss by floating out to sea.

What will be a reasonable use of the piers for that purpose, will depend upon the quantity of lumber in the river, and the state of the tides, winds, and currents at the time.

Where lumber, floating down the river in the course of navigation, is left by the tide on the shore between high and low water mark, without any negligence on the part of the owner of the lumber, it is not an improper interference with the right of the riparian owner, if it is removed within a reasonable time.

Where on an application for an injunction to restrain the erection of piers and booms in a tidal river, the bed of which belongs to the plaintiff, and to prohibit interference with his riparian rights, it was agreed that the Judge should assess the damage which the plaintiff had sustained by the acts of the defendant, the amount assessed is not the subject of appeal, it being mere matter of agreement, and no part of the duty of the Judge under the Equity Act.

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### *In re* FAIRLEY AND WILSON.

#### *Arbitration—Award—Uncertainty.*

An award ought to be so certain that no reasonable doubt can arise on the face of it as to the arbitrators' meaning, or as to the nature and extent of the duties imposed by it on

the parties; and if it be doubtful whether the award has decided the questions referred, it will be set aside for uncertainty.

Two partners being possessed of a considerable quantity of real and personal estate, and having a large amount of debts due them, desired to dissolve the partnership, but being unable to agree upon terms, submitted all matters in difference between them to arbitration. The arbitrators awarded that one of the partners should pay the other a certain sum in full payment, discharge, and satisfaction of all moneys, debts, and demands due or owing by him to his co-partner upon any account whatsoever.

*Held*, that the award was bad for uncertainty—there being no decision respecting the partnership property.

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### KINGSTON v. WALLACE.

*False imprisonment—Liability of informant for arrest under warrant—Omission in warrant to state information on oath—Irregularity—Malicious injury to property—32 & 33 V. c. 22, ss. 49 and 50—Statement of value.*

A person applying to a magistrate for a warrant to arrest another for an alleged offence, is deemed only to appeal to the magistrate to exercise his jurisdiction, and is not liable in trespass for an arrest under the warrant; but, if he goes beyond this, and interferes in the exercise of the ministerial powers under the warrant, he will be liable.

Where an information is on oath, the omission to state that fact in a warrant to arrest is an irregularity only.

Neither an information against a person for malicious injury to property, under the 32 & 33 V. c. 22, ss. 49, 50, nor the warrant issued thereon, stated the value of the property injured.

*Held*, an irregularity only, as the magistrate had jurisdiction over the offence, either by way of preliminary examination, if the value exceeded \$20, or summarily, if it was within that sum.



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NOTED, DIGESTED, AND REPORTED IN THIS  
VOLUME;

AND ALSO OF THE CASES PUBLISHED DURING 1887 IN THE OFFICIAL  
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SELECTED CASES FROM THE PROVINCE  
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